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In the Supreme Court of the United States

OCTOBER TERM, 2004

TAREK H. JIFRY;
MAAN H. ZARIE

PETITIONERS,

v.

FEDERAL AVIATION ADMINISTRATION;
TRANSPORTATION SECURITY ADMINISTRATION; AND
NATIONAL TRANSPORTATION SAFETY BOARD

RESPONDENTS.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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Dated November 8, 2004

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QUESTIONS PRESENTED FOR REVIEW

1. May the U.S. Government revoke a pilot's FAA issued airman's certificate solely upon classified evidence without notice and hearing and without meaningful agency and judicial review as provided by statute?

2. Whether regulations promulgated by the FAA and the TSA may be construed to eliminate meaningful agency review by the NTSB as provided by the Congress, and to prevent a pilot from learning the basis for the revocation of his airman's certificate and contesting the charge before an independent decisionmaker?

PARTIES TO THE PROCEEDING

In accordance with Rule 14.1(b), the following list represents all of the parties before the United States Court of Appeals for the District of Columbia:

Tarek H. Jifry and Maan H. Zarie were the Petitioners below. The Federal Aviation Administration, the Transportation Security Administration, and the National Transportation Safety Board were the Respondents below.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. A-1) is reported at 370

F.3d 1174 (D.C. Cir. 2004). The opinion of the National Transportation Safety Board (App. A-17) is unreported. The denial of the petition for rehearing (App. A-51) is reported at 2004 U.S. App. LEXIS 16389 (D.C. Cir. Aug. 9, 2004) and the denial of the petition for rehearing *en banc* (App. A-56) is reported at 2004 U.S. App. LEXIS 16390 (D.C. Cir. Aug. 9, 2004).

JURISDICTION

The Court of Appeals' Judgment was entered on June 11, 2004 (App. A-1). A Petition for Rehearing, timely filed, was denied by that Court on August 9, 2004 (App. A-51). A Petition for Rehearing *en banc*, timely filed, was also denied by that Court on August 9, 2004 (App. A-52). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth Amendment to the US Constitution which provides, in relevant part:

> No person shall be... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. This case also involves a provision of the Federal Aviation Act regarding certificate revocations, 49 U.S.C. § 44709, and a regulation promulgated by the Federal Aviation Administration, 14 C.F.R. § 61.18, and by the Transportation Security Administration, 49 C.F.R. § 1540.117, all of which are reproduced in the Appendix (A-53 *et seq.*).

STATEMENT OF THE CASE

Petitioners Tarek H. Jifry and Maan H. Zarie were senior pilots with Saudi Arabian Airlines and citizens of Saudi Arabia who had their airman certificates revoked by the Federal Aviation Administration (FAA) pursuant to the Federal Aviation Act of 1958, as amended. The Federal Aviation Act, 49 U.S.C. § 40101 *et seq.* (2000).[1]

I. The Initial Revocation Action

On August 14, 2002, the Transportation Security Administration (TSA) sent two separate letters to the FAA stating that Captain Jifry and Captain Zarie were a threat to aviation or national security. On August 20, 2002, on the basis of the TSA letters, the FAA revoked the pilots' certificates under 49 U.S.C. § 44709(b). The FAA revoked the pilots' airmen certificates based on the letters from the TSA which stated simply that the pilots were risks to aviation safety and national security. The TSA did not disclose the reason why it concluded that the pilots were risks to aviation safety and national security. Nor did the TSA, at any time in the course of this case, reveal to the pilots any information or evidence upon which the revocation was based.

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[1] The FAA certifies all Saudi airman certificate holders pursuant to an agreement between the Government of the United States and the Kingdom of Saudi Arabia dating back to 1982. The Saudi Presidency of Civil Aviation (PCA) does not independently issue certificates. Any suspension or revocation of these certificates were subject to the regulatory authority of the FAA and to proceedings governed by the Federal Aviation Act, 49 U.S.C. § 44709(b) (App. A-53) and the Administrative Procedure Act, 5 U.S.C. § § 551-559 (2000).

The pilots, not knowing the basis of the TSA's charge, were unable to challenge and confront the charge. Nevertheless, the pilots denied the charges and timely appealed the revocations to the National Transportation Safety Board (NTSB). Rules of Practice in Air Safety Proceedings, 49 C.F.R. Part 821 (2003).

Under procedures established by the Congress under the Federal Aviation Act and the Administrative Procedure Act (APA), Administrative Law Judge (ALJ) Patrick Geraghty of the NTSB was assigned to hear the case of the pilots' certificate revocations by the FAA.

With the case before Judge Geraghty, the pilots attempted to learn through discovery the basis for the charge and its evidentiary support. The pilots needed to know the basis so they could refute it. During a January 17, 2003 teleconference, Judge Geraghty issued orders allowing discovery to proceed against the TSA and FAA to discover the basis of the charge. Judge Geraghty ordered (1) that the TSA join the actions; (2) that if the FAA and TSA planned to claim privilege, they must provide a privilege log; and (3) that depositions of key Government TSA witnesses should take place by the middle of February, 2003. On January 21, 2003, the TSA joined the proceeding before Judge Geraghty.

Within days of Judge Geraghty's Order, the TSA, on January 24, 2003, promulgated new regulations (Threat Assessment Regarding Alien Holders of, and Applicants for, FAA Certificates, 68 Fed. Reg. 3762 (Jan. 24, 2003) codified at 49 C.F.R. § 1540.117), as a final rule without notice and comment and issued Initial Notices of Threat Assessment (INTA) against the pilots pursuant to the new regulations. The FAA also simultaneously issued new regulations (Ineligibility for an Airman Certificate Based on Security Grounds, 68 Fed. Reg. 3772 (Jan. 24, 2003) codified at 14

C.F.R. § 61.18), without a notice and comment period, voluntarily dismissed the pending revocation actions at the NTSB, and suspended the pilots' airman certificates under the new regulations.[2]

II. The New Rules

The new FAA regulation makes any person whom the TSA finds to be a security threat ineligible to hold an airman certificate. 14 C.F.R. § 61.18. (App. A-56). Under this regulation, the FAA must automatically suspend any certificate when the TSA issues an INTA to the holder. *Id.*

After an INTA is issued against an individual, that individual may request the "releasable materials from the TSA upon which the Initial Notification was based." 49 C.F.R. § 1540.117(e)(2). The TSA may or may not respond and will not provide any information which is classified or is Sensitive Security Information (SSI). 49 C.F.R. § 1540.117(e)(3), (g). The TSA has stated that the targeted person is unlikely to receive any response from the TSA because "[i]n most cases, the determination that an individual poses a security threat will be based, in large part or exclusively, on classified national security information, [and] unclassified information designated as SSI..." 68 Fed. Reg. at 3765.

After the TSA responds to the request for materials, the targeted individual is allowed to file a reply stating why he does not pose a security threat. 49 C.F.R. § 1540.117(e)(4). The TSA then makes a final determination, either withdrawing the INTA or issuing a FNTA. 49 C.F.R. § 1540.117(f).

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[2] Under the new regulations, the issuance of an INTA causes the automatic suspension of an airman certificate by the FAA. A Final Notice of Threat Assessment (FNTA) causes an automatic revocation. The FAA in effect withdrew the revocation actions under the old rules and simultaneously began suspension actions under the new rules.

III. The Administrative Proceedings under the New Rules in The Case at Bar

Under the new regulation, the TSA issued INTAs to the FAA designating Captain Jifry and Captain Zarie as security threats. The FAA then suspended the pilots' airman certificates pursuant to the new regulations. (App. A-56); 14 C.F.R. § 61.18.

The pilots timely appealed the suspension of their certificates to the NTSB on the ground that they were not security risks. Their appeal was denied first by Judge Geraghty and then by the full Board (NTSB). Judge Geraghty found that because of the new regulations the NTSB's scope of review was limited to one issue: whether the TSA had informed the FAA in writing (issued an INTA) that the pilots were security threats. (App. A-33, A-42). Judge Geraghty concluded that whether or not the pilots were actually security threats or whether there was a basis for such finding was irrelevant under the new regulations. These NTSB proceedings focused solely upon the TSA's INTA. The TSA never disclosed the basis or any evidence in support of its conclusory determination that the pilots posed a security risk.

The pilots also simultaneously challenged the TSA's issuance of the INTA before the TSA. The INTA contained no specific allegations and recited no evidence that the pilots posed security threats. On February 6, 2003, the pilots requested "releasable materials from the TSA" in accordance with 49 C.F.R. § 1540.117(e)(2), but the TSA provided documents almost completely redacted, except for identity and passport information. The redacted pages provided no information about why the TSA believed the pilots posed a security threat.

In accordance with 49 C.F.R. § 1540.117(e)(4), the pilots each filed a Reply to the INTA stating that they do not pose a security threat and that there was no evidence that they posed a security threat. In the Replies, the pilots denied the charge and submitted affidavits detailing their long untarnished record as pilots with Saudi Arabian Airlines and stating that they were not terrorists, nor were they sympathetic to terrorists and had no associations with people known or rumored to be involved with terrorists or terrorist organizations.

Captain Jifry stated that he has been employed by Saudi Arabian Airlines as a pilot or first officer for approximately twenty years. He had over 8,000 hours of service as a pilot. His flying record is untarnished. Previously, he had had his airman certificate routinely renewed by the FAA. Captain Jifry is a family man with a wife and four children in Saudi Arabia.

Captain Zarie stated that he has been employed by Saudi Arabian Airlines as a pilot or first officer for approximately eighteen years. He has over 10,000 hours of service as a pilot. His flying record is also untarnished. Previously, he has had his certificate routinely renewed by the FAA. Captain Zarie also is a family man with a wife and four children in Saudi Arabia.

In their Replies, the pilots could not directly address the TSA's factual basis of the TSA's Threat Assessment because they did not know the basis of the Threat Assessment.

On May 8, 2003, the TSA denied the pilots' challenge to the INTA, without explanation, and issued a Final Notice of Threat Assessment (FNTA). Thereupon, the FAA revoked the pilots' airman certificates. The pilots then appealed the

revocation of their certificates to the NTSB on the ground that they were not security risks. Judge Geraghty, to whom the pilots again appealed, upheld the revocations without a hearing. Judge Geraghty held that, under the TSA and FAA rules, he was bound by the TSA threat assessment and upheld the FAA's revocation.

The pilots then appealed the revocation of their certificates to the whole NTSB on the ground that they were not security risks. Their challenge was denied for the same reasons as the challenge to the suspension was denied.

Although the appeal process before the NTSB established by the Congress under the Federal Aviation Act and the APA remained in effect, the NTSB on review of the ALJ's decision found that the new regulations issued by the TSA and the FAA controlled, and in effect trumped the NTSB appeal procedures established by the Federal Aviation Act and the APA. (*See* App. A-51). The NTSB found that it was bound by the TSA's determination of an Initial Notice of Threat Assessment (INTA) and Final Notice of Threat Assessment (FNTA).

The pilots had their airman certificates revoked without ever being told why they "posed" security risks. They have lost their livelihood and careers as pilots. Because of these determinations by the FAA and TSA and the revocation of their pilot certificates, they can no longer operate aircraft, anywhere. *See* Requirements for certificates, ratings, and authorizations, 14 C.F.R. § 61.3(b) (2003).

IV. The Appeals to the D.C. Circuit

Captains Jifry and Zarie then petitioned for review to the United States Court of Appeals for the District Of Columbia Circuit. In particular, the pilots sought review of the suspension and the revocation of their certificates, and the issuance of the FNTA without any evidence that they pose security risks. The pilots contended that they were denied administrative due process in that they were not notified of the basis of the Threat Assessments or given a meaningful opportunity to challenge the evidence, which was entirely presented in secret. The Court of Appeals upheld the Government action which was based solely on a secret and classified record. (App. A-1). The pilots' petition was denied by the D.C. Circuit on June 11, 2004. (App. A-1). The pilots then sought rehearing and rehearing *en banc* which were denied on August 9, 2004. (App. A-51, A-52).

REASONS FOR GRANTING THE PETITION

To support the TSA's conclusion that the pilots were security risks, the U.S. government submitted secret classified "intelligence" to the Appeals Court, which treated this classified "intelligence" as an administrative record, and upheld the revocation of the pilots' certificates. As a matter of administrative law and due process, this case may be the first case in this country where a person's FAA-issued license (airman's certificate) was revoked based wholly upon classified material and information. The opinion below establishes a destructive precedent which undermines the importance of administrative due process long established and preserved by the Court.

In this case, the pilots' airman certificates, issued by the FAA were revoked because of the TSA's finding that the pilots were risks to national security. They were given no

notice of the basis of the TSA's finding and were unable to challenge the basis of the finding. The determination that they were risks to U.S. national security was made by the TSA (not a neutral decisionmaker) based upon secret, classified information which was not part of the public administrative record.

The due process and review rights established by Congress were eviscerated by the new regulations promulgated by the TSA and FAA as final rules, which, as construed by the NTSB and the Court below, purported to require the NTSB to accept the TSA finding as conclusive and binding.

On review before the D.C. Circuit, there was no evidence in the administrative record before the Court – not a morsel – to support the TSA's charge that the pilots were security risks. To create a record on which the Court below could rule, the U.S. Government, *in camera* (without the authority of a statute or court rule), submitted secret, allegedly classified material which the Appeals Court then treated as the "administrative record." On the basis of this secret evidence, the Appeals Court upheld the revocation of the pilots' certificates.

At the heart of this case is the essential balance that must be struck between due process rights and security concerns. In his recent book, *All the Laws But One*, Chief Justice Rehnquist discussed this balance of civil liberties in time of war taken by U.S. Courts throughout history. In conclusion, he wrote "[I]t is both desirable and likely that more careful attention will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty." William H. Rehnquist, *All the Laws But One,* 225 (1998).

I. This Case Presents Due Process Issues of Fundamental Importance

This case raises an important question of administrative due process: may the Government designate a person a security threat and, on that ground, revoke his FAA-issued certificate, entirely on the basis of secret evidence, without notice of the basis of the charge or an opportunity to meaningfully challenge it.

The due process clause of the Fifth Amendment guarantees that "no person shall ... be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Procedural due process "provides that certain substantive rights - life, liberty, and property - cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). *See also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J. concurring).

In this case, Petitioners were deprived of their FAA-issued airman certificates and their livelihood solely on the basis of secret evidence without notice of the basis of the charge or an opportunity to meaningfully challenge it. The Court below stated that the revocations were made pursuant to 49 U.S.C. § 44709(b). (App. A-2). That statute specifically provides for appeal to the NTSB with the pilots provided with "notice and an opportunity for a hearing." 49 U.S.C. § 44709(d).

The Appeals Court, citing 49 U.S.C. § 44703(e)(2), stated that "Congress distinguished between citizens and aliens, conferring broad discretions to the FAA regarding alien pilots." *Jifry v. FAA*, 370 F. 3d 1174, 1176(D.C. Cir.

2004)(App. A-2 *citing* 49 U.S.C. § 44703(e)). However, that statutory provision addresses issuance of certificates by the FAA to aliens including the right to make the issuance of a "certificate to an alien dependent on a reciprocal agreement with the government of a foreign country." 49 U.S.C. § 44703(e)(2).

The section which applies to revocations, 49 U.S.C. § 44709(b), however, is the applicable statute, not the one the Court below cited which deals with the issuance of certificates. The revocation statute, 49 U.S.C. § 44709(b), does not distinguish between citizen and alien pilots as to the administrative due process to which both are entitled under the Federal Aviation Act and the APA, when such certificates are revoked by the FAA.[3]

No evidence of any kind was ever disclosed in the administrative record that the pilots were a threat of any kind. The upshot of the Appeals Court ruling is that the Government will now be able to cite this decision for the proposition that a Government Agency, in the name of national security, may deprive a person, Congressional statutes notwithstanding, of his liberty or property right in an administrative proceeding based solely on secret evidence.

The D.C. Circuit had previously held that due process is required when the government issues a stigmatizing designation as a result of which the individual is deprived of a right previously held. *See Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001). Analogously, in this case, the TSA issued a threat assessment against the pilots stigmatizing them as threats to U.S.

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[3] Where, as here there is a statute which confers certain due process rights, there is little reason to think that Congress intended the coverage of the statute to vary depending upon citizenship. See *Rasul v. Bush*, 124 S. Ct. 2686, 2696 (2004) ("Aliens held at the base, no less than American citizens, are entitled to invoke the federal court's authority…").

national security which resulted in the revocation of their FAA certificates and in the destruction of their careers as pilots. The pilots' certificates were revoked without having been provided the bare minimum of due process: the right to know the basis for the charge and the right to test the accuracy of that evidence and counter it with their own evidence before an independent decisionmaker.

"The right to know the evidence against one" and the opportunity to challenge such evidence before an independent decisionmaker is the minimal core of due process. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975). In addition to denying these minimum due process requirements, the finding of the TSA was upheld by the Appeals Court solely on the basis of secret evidence. In the past, the Appeals Court had rejected the proposition that a case may be decided on the basis of secret evidence. *See Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986) *aff'd*, 484 U.S. 1 (1987). In *Abourezk*, Judge Ruth Bader Ginsburg wrote:

> It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions ... Only in the most extraordinary circumstances does our precedent countenance court reliance upon ex parte evidence to decide the merits of a dispute.

Id. at 1061.

The pilots were not afforded any meaningful due process protections. The Court should grant this Writ as it raises an important federal question as to whether the requisite

administrative due process can be provided when the Government's case is based solely on secret evidence.

II. The Court of Appeals Ruling Conflicts with a Decision of the Ninth Circuit

The decision in this case conflicts with the Ninth Circuit decision in *American-Arab Anti-Discrimination Comm. v. Reno* (*AAADC I*), 70 F.3d 1045 (9th Cir. 1995).[4] The conflict arises out of the mistaken interpretation and application of the balancing test set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine the level of due process which must be afforded. A conflict between the Circuits on this due process issue raises a fundamental Constitutional question which this Court should resolve.

A. The *Mathews* Balancing Test

The Supreme Court in *Mathews* emphasized that "the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333. In *Mathews*, the Court formulated a three-part "balancing" framework to address the due process that an individual must be afforded. The

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[4] This decision was not appealed by either party. The case was remanded to the District Court and subsequently was appealed back to the Ninth Circuit on different grounds. Subsequent to *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, cited herein, and pending further appeal in the Ninth Circuit, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The later case was granted certiorari by the Court based solely on the question of whether the District Court had jurisdiction under the IIRIRA. The Court then vacated the Ninth Circuit's determination that the federal courts had jurisdiction over the claims. *American-Arab Anti-Discrimination Committee v. Reno*, 525 U.S. 471 (1999).

Mathews test addresses three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest. *Id.* at 335.

B. The Ninth Circuit Opinion

In *AAADC I,* the Ninth Circuit was faced with a case where plaintiffs alleged that the Immigration and Naturalization Service (INS) selectively enforced the immigration law based on their membership in a group that allegedly advocated world communism. *AAADC I*, 70 F.3d at 1052. The plaintiffs challenged the INS's use of undisclosed classified information in making their determination. The Ninth Circuit held that the District Court had correctly applied the *Mathews* balancing test in deciding that use of undisclosed classified information under those circumstances violates due process. *Id.* at 1061.

The Ninth Circuit after addressing the private interest involved addressed the second prong of the *Mathews* test – the risk of erroneous deprivation. The Court in analyzing the use of undisclosed classified information stated that, "[o]ne would be hard pressed to design a procedure more likely to result in erroneous deprivations." *Id.* at 1069. The Court went on to note that "[w]ithout any opportunity for confrontation, there is no adversarial check on the quality of the information on which the INS relies." *Id. at 1069* (*citing Knauff v. Shaughnessy,* 338 U.S. 537, 551 (1950) (Jackson, J., dissenting) ("The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.").

The Ninth Circuit in highlighting the importance of disclosure stated:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

AAADC I, 70 F.3d at 1069.

The Ninth Circuit understood that the risk of erroneous deprivation was enormous where the Government relied on undisclosed secret evidence. The Court stated that judges were "necessarily wary of one-sided process: 'democracy implies respect for the elementary rights of men . . . and must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.' *Id.* at 1069 (citing *Anti-Fascist Comm. v. McGrath,* 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring). The Court stated that "the very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error." *Id.*

The Ninth Circuit then addressed the Government interests in security. In applying the three factors, the Court concluded that the Government interest, however valid, could not be balanced by the almost certain risk of erroneous deprivation caused by using secret undisclosed evidence. The Court held that: "[b]ecause of the danger of injustice

when decisions lack the procedural safeguards that form the core of constitutional due process, the *Mathews* balancing suggests that use of undisclosed information in adjudications should be presumptively unconstitutional." *Id.* at 1070.

The Ninth Circuit ruling in this matter is unequivocal and stands for the principle that the Government cannot use secret evidence as a weapon to deprive a person of their property, in this case, the pilots' FAA-issued airman certificates.

C. The D.C. Circuit Opinion in the Case at Bar

As in the Ninth Circuit case, the D.C. Circuit began by applying the *Mathews* balancing test. The Appeals Court stated that, "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'" (App. A-14 *citing Mathews*, 424 U.S. at 333). After minimizing the pilots' interest in their careers and reputations, the Appeals Court dismissively addressed the erroneous deprivation prong stating that:

> Whatever the risk of erroneous deprivation, the pilots had the opportunity to file a written reply to the TSA's initial determination and were afforded independent *de novo* review of the entire administrative record by the Deputy Administrator of the FAA … and *ex parte, in camera* judicial review of the record.

(App. A-14).

The Court, in the above passage, basically listed three "processes" that were afforded the pilots and held that, in this case, this was the only "process" that was due. (*Id.*)

First, while the pilots were able to file a written reply to the initial TSA determination, they could not address the basis for the TSA's claim that they were risks to national security, because they had no idea of the basis for the charge. Because the TSA determination was based solely on undisclosed information, the pilots could only offer a general denial that they were a threat to national security.

Secondly, in the above quote, the Court states that the pilots were afforded independent *de novo* review of the entire record by the Deputy Administrator of the FAA. No review was ever performed by any independent agency or Judge as to the basis of the charge or the evidence supporting the Threat Assessment itself. The Deputy Administrator of the FAA was not an independent decisionmaker, he was the proponent of the revocation. The only review provided by the ALJ or the whole NTSB was whether the TSA notified the FAA that the pilots were a threat.

Thirdly, in the above quote, the Court states that the pilots were provided *ex parte, in camera* judicial review of the record. This is true, but the entire "record" consisted of undisclosed classified evidence that was never at any junction tested by an adversarial process. It is not even clear that the "record" the Court reviewed was the same record that was before the TSA and the NTSB. The Appeals Court, as to this issue, cites *Nat'l Council of Resistance of Iran v. Dep't of State (NCOR I)*, 251 F.3d 192 (D.C. Cir. 2001) for the proposition that the agency "needed only to disclose the unclassified portions of the record." (App. A-15). In *NCOR I*, however, there was a statute which authorized agency consideration of classified evidence. *See NCOR I*, 251 F.3d at 196. Nowhere in that statute, however, does it provide that classified evidence alone may support such a designation.

In *NCOR I,* there was sufficient unclassified evidence in the public administrative record to support the agency finding and by statute classified evidence could be considered. *Id* at 196. *See also People's Mojahedin Org. of Iran v. United States Dep't of State (Mojahedin I)*, 327 F. 3d 1238 (D.C. Cir. 2003) (Edwards, J. concurring); *Nat'l Council of Resistance of Iran v. Department of State (NCOR II)*, 373 F.3d 152 (D.C. Cir. 2004). In the case at hand, there is no evidence in the public administrative record to support the finding that the pilots were a threat to national security. All the evidence or information upon which the charge was based was deemed classified and secret. This case was based solely on undisclosed evidence, a result, contrary to *AAADC I* and unprecedented in administrative due process.

D. Conclusion

The decision below allows the TSA to be both the prosecutor and the judge in secret. Such a process is repugnant to the Constitution and violative of the enactments of Congress, and raises important concerns if this decision stands as precedent. The decision in this case is contrary to D.C. Circuit holdings (*See Abourezk v. Reagan, supra* at p. 13) as well as the Ninth Circuit holding in *American-Arab Anti-discrimination League.* The Court does not appear to have ruled on the due process implications of the Government's use of classified evidence in a U.S. administrative or court proceeding.

Accordingly, this case presents the opportunity for the Court to settle a conflict between the Circuit Courts on an important question of administrative due process which this Court should resolve.

III. The Decision Below Eviscerates The Procedural Protections Afforded by Congress in The APA and The Federal Aviation Act of 1958.

The Court of Appeals' resolution of the administrative due process issues creates damaging precedent under the Administrative Procedures Act (APA) and the Federal Aviation Act of 1958. Under the APA, each party is entitled to present his case, to submit rebuttal evidence, and to conduct cross-examination "as may be required *for a full and true disclosure of the facts*." 5 U.S.C. § 556(d) (emphasis added).

The Administrative Law Judge must include in the order a statement of the findings and conclusions and the basis of those findings "on all the material issues of fact, law or discretion presented on the record." 5 U.S.C. § 557. The APA has incorporated safeguards of the party's Fifth Amendment due process rights in its language. *See Sloan v. HUD*, 231 F.3d 10, 18 (D.C. Cir. 2000) ("An agency may not issue an order without the 'core requirements' of due process: adequate notice and a meaningful hearing."). The administrative record must be made up of the parties' submissions, including the transcripts of testimony, exhibits, and proposed findings and conclusions and related documents. 5 U.S.C. §§ 556(e), 557(c).

In enacting the Federal Aviation Act of 1958 (in particular, 49 U.S.C. § 44709), Congress created a system whereby, if the FAA takes an action against a pilot, that pilot can learn the factual allegations against him and challenge those factual allegations before a neutral decision-maker—the NTSB Administrative Law Judge. The decision of the Appeals Court in this case disregards these congressionally provided due process rights and renders them meaningless.

The regulations that the TSA and the FAA promulgated in 2003 at a final rule, as interpreted by the Court of Appeals and the NTSB bypasses all of these statutory preserved due process rights. Under the decisions of the NTSB and the Court below, if the TSA says a pilot is a security risk, the FAA is bound by it; the pilots cannot challenge it, nor can the NTSB, on review, do anything but "rubber stamp" it.

In her non-concurring opinion to the NTSB decision in this case, NTSB member Carmody said:

> I will not approve this opinion...No intellectual power is required to agree that the individuals had certificates and that the TSA notified the FAA that the men were a security threat. There is no question about these facts. If this is the appeal process, it is flawed and senseless. Approving such an order gives it a legitimacy that it doesn't deserve. Further, it does not seem responsive to the request for review.

(App A-20).

By act of Congress, the NTSB had jurisdiction pursuant to the Federal Aviation Act of 1958, as amended (particularly, 49 U.S.C. § 44709), and the NTSB Rules of Practice (49 C.F.R. § 821.1 *et seq.*) to review this matter. The standard of review in NTSB proceedings is well-settled. 49 U.S.C. § 44709 and 49 C.F.R. § 821.1 *et seq.* In reviewing an action of the FAA, the NTSB shall set aside, and hold unlawful, any agency finding it determines to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *Reno v. NTSB*, 45 F.3d 1375, 1378 (9th Cir. 1994); *Hughes Air Corp. v. C. A. B.*, 482 F.2d 143 (9th Cir. 1973).

When enacting the Federal Aviation Act of 1958, Congress specifically stated that an aggrieved certificate holder may appeal to the FAA, "where he will be given a full hearing complying in all respects with the requirements of the Administrative Procedure Act." H.R. REP. No. 85-2360 (1958). In accordance with the APA, the aggrieved party is entitled to due process. *See* 5 U.S.C. § § 553-558. Congress chose not only to rely on the APA, but included additional procedural guidelines for review of FAA agency orders in the Federal Aviation Act, which Congress expected the NTSB and FAA to follow. 49 U.S.C. § 44709.

Under the regulations promulgated by the NTSB, the ALJ's decision can be overturned if the "findings of fact [are not] each supported by a preponderance of reliable, probative, and substantial evidence." 49 C.F.R. § 821.49(a)(1), (b). A certificate holder is entitled to appear and be heard, 49 C.F.R. § 821.6, and "each party shall have the right to present a case-in-chief, or defense, by oral and documentary evidence, to submit evidence in rebuttal, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 49 C.F.R. § 821.38. A certificate holder is allowed discovery from parties and non-parties. *See* 49 C.F.R. §§ 821.19, 821.20.

The structure of these regulations, in accordance with the statute, contemplates a hearing in which the facts relied on by the Administrator must be presented and may be contested by a certificate holder.

If the ALJ and the NTSB are barred from determining the validity of the TSA Threat Assessment through an independent review of the evidence, the right to a hearing and review is rendered meaningless. If the new TSA and FAA regulations are interpreted to allow a pilot to lose his

certificate on the basis of secret evidence which he can never challenge and the NTSB cannot review, such an interpretation would be against the clear and expressed intent of Congress to provide certificate holders with the due process protections contemplated by the Federal Aviation Act of 1958 and the APA.

Pursuant to 49 U.S.C. § 44709, an individual whose certificate is revoked by the FAA may appeal to the NTSB, at which time the individual shall be given "notice and an opportunity for a hearing" and the Board may "amend, modify, or reverse the order when the Board finds...that safety in air commerce or air transportation and the public interest do not require affirmation of the order." 49 U.S.C. § 44709(d). The Statute goes on to state:

> When conducting a hearing under this subsection, **the Board is not bound by findings of fact of the Administrator** but is bound by all validly adopted interpretations of laws and regulations the Administrator carries out and of written agency policy guidance available to the public related to sanctions to be imposed under this section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law.

49 U.S.C. § 44709(d)(3) (emphasis added).

Since "the Board is not bound by findings of fact of the Administrator," the statutory scheme contemplates that a pilot will be allowed to challenge the facts on which the revocation of his license was based. The Appeals Court opinion in this case, relying on the new TSA and FAA regulations, disregards and renders meaningless the hearing

process required by statute, when as here, it holds that pursuant to these regulations, the TSA may rely entirely on undisclosed evidence.[5]

The TSA and FAA by regulation cannot eliminate the administrative due process rights established by the Congress ("If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress" . . . "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron U.S.A. v. Nat'l Res. Def. Council*, 467 U.S. 837, 842-3 n. 9 (1984).

Under the D.C. Circuit's and the NTSB's opinions, the NTSB's sole function is to "rubber stamp" the TSA security threat determination without ever reviewing the evidence supporting that determination. The D.C. Circuit ruling turns the administrative review process into a "rubber stamp," denying the petitioners' fundamental procedural due process contrary to statute and the Court's decision in *Chevron*.

The Court should grant the Writ and review this highly destructive precedent which represents a radical and unprecedented departure from the well established principles of administrative due process codified by acts of Congress: administrative due process rights of notice and an opportunity to challenge, an independent decisionmaker, a

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[5] Even under the Freedom of Information Act, 5 U.S.C. § 552 (2000), usually any person (not just an aggrieved party like the pilots who are in jeopardy of losing their certificates, their livelihood, and their reputation) is entitled to segregated parts or summaries and a Vaughn Index where issues of national security are implicated. *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

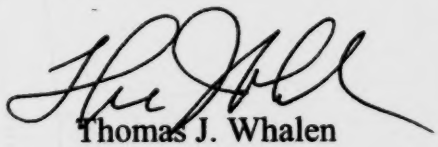
public administrative record enabling administrative review by the NTSB and judicial review by the Court below. The pilots in this case received none of these basic due process rights.

The Petitioners request the Court to accept this case for review, overturn the damaging precedent of this case, and affirm the continuing importance and validity of these tenets of administrative due process.

CONCLUSION

Wherefore, for the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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Dated November 8, 2004

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 30, 2004 Decided June 11, 2004

No. 03-1085

TAREK H. JIFRY AND MAAN H. ZARIE, PETITIONERS

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.,
RESPONDENTS

Consolidated with Nos. 03-1143, 03-1144, 03-1282

On Petitions for Review of an Order of the Federal Aviation Administration

Thomas J. Whalen argued the cause for petitioners. With him on the briefs was Evelyn D. Sahr.

Douglas N. Letter, Attorney, U.S. Department of Justice, argued the cause for respondents. With him on the brief were *Peter D. Keisler*, Assistant Attorney General, and *E. Roy Hawkens* and *Catherine Y. Hancock*, Attorneys.

Before: ROGERS, TATEL and GARLAND, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: Petitions filed by two non-resident alien pilots challenge certain aviation regulations adopted in the wake of the September 11, 2001 terrorist attacks. From the establishment of the Transportation Security Administration ("TSA") in November 2001 to the promulgation of the challenged regulations in January 2003, aviation security has undergone a fundamental transformation. The pilots contend that the new procedures resulting in the revocation of their airman certificates issued by the Federal Aviation Administration ("FAA") violated the Administrative Procedure Act ("APA") and the due process clause of the Fifth Amendment to the United States Constitution. Specifically, they contend that the January 2003 regulations were unlawfully promulgated without notice and comment, that the revocations were not supported by substantial evidence in the record, and that they were denied meaningful notice of the evidence against them and a meaningful opportunity to be heard.

I.

Congress has delegated broad discretion to the Federal Aviation Administration ("FAA") to prescribe regulations and standards for safety in air commerce and national security. *See* 49 U.S.C. § 44701(a)(5). The FAA may "at any time" reexamine the issuance of an airman certificate and issue an order "modifying, suspending, or revoking" a certificate if the Administrator determines that such action is required for "safety in air commerce" and "the public interest." 49 U.S.C. § § 44709(a), (b). With regard to issuing airman certificates to qualified individuals, Congress distinguished between citizens and aliens, conferring broad discretion to the FAA regarding alien pilots. *See id.* § 44703(e). After the September 11, 2001 terrorist attacks, Congress established the Transportation Security Administration ("TSA") on November 19, 2001, and transferred much of the responsibility for civil aviation security from the FAA to the TSA. *See id.* § § 114(d), (f).

This case concerns alien pilots only; citizens and resident alien pilots have challenged the applicable regulations in *Coalition of Air Line Pilots Ass'ns v. FAA,* Nos. 03-1074 and 03-1076 (D.C. Cir. June 11, 2004). The two pilots, Jifry and Zarie, are citizens of Saudi Arabia who have used their FAA certificates to pilot flights abroad, but have not operated Saudi Arabian Airlines flights to the United States in the past nine and four years, respectively. On August 14, 2002, the TSA sent letters to the FAA requesting that Captain Jifry and Captain Zarie have their airman certificates revoked, stating that "based upon information available to us," they presented "a security risk to civil aviation or national security." The FAA notified Jifry and Zarie by letters of August 20, 2002, that their airman certificates would be revoked because the Acting Under Secretary of Transportation for Security, pursuant 49 U.S.C. § § 44709(b)(1)(A) and 46105(c), had determined that they presented risks to aviation or national security. The FAA revoked the pilots' certificates, *see* 49 U.S.C. § 44709(b), and the pilots appealed the revocations to the National Transportation Safety Board ("NTSB"). *Id.* § 44709(d). An administrative law judge ("ALJ") held a telephonic pre-hearing conference on January 17, 2003, and ordered that the FAA and the TSA provide a privilege log and that depositions of key witnesses take place by mid-February.

A week later, on January 24, 2003, the FAA dismissed the revocation actions against Jifry and Zarie, and in conjunction with the TSA, published, without notice and comment, new regulations governing the suspension and revocation of airman certificates for security reasons. *See* 14 C.F.R. § 61.18, 49 C.F.R. § 1540.117. The new FAA regulation, 14 C.F.R. § 61.18, provides for automatic suspension by the FAA of airman certificates upon written notification from the TSA that the pilot poses a security threat and, therefore, is not eligible to hold an airman certificate. The TSA simultaneously promulgated 49 C.F.R. § 1540.117, which establishes the

procedure by which the TSA initially and finally notifies nonresident aliens who hold or apply for FAA certificates that they pose a security threat, and requires the TSA to notify the FAA once the TSA has determined that a pilot is a security threat. Upon finding that a pilot poses a "security threat," *see* 49 C.F.R. § 1540.117(c), the TSA Assistant Administrator for Intelligence issues an Initial Notification of Threat Assessment ("Initial Notice") to the individual and serves that determination upon the FAA. *See id.* § 1540.117(e). The FAA then suspends the pilot's certificate. *See* 14 C.F.R. § 61.18(b)(2). No later than 15 days after service, the pilot may make a written request for copies of releasable materials upon which the Initial Notice was based. *See* 49 C.F.R. § 1540.117(e)(1) & (2). The TSA must respond not later than 30 days after receiving the request, and the pilot may submit a written reply within 15 days of receiving the TSA's response. *See id.* § 1540.117(e)(3) & (4). At that point, the TSA Deputy Administrator must review the entire record *de novo* to determine if the pilot poses a security risk. *Id.* § 1540.117(f)(1). If the Deputy so determines, the TSA serves a Final Notification of Threat Assessment ("Final Notice"), *id.* § 1540.117(f)(2), and the FAA revokes the certificate. *See* 14 C.F.R. § 61.18(c)(2). The pilot may appeal the certificate revocation to the NTSB. *See* 49 U.S.C. § 44709(d). Upon exhaustion of these administrative remedies, the pilot may seek review in the court of appeals, which may review the case on the merits. *See id.* § § 44709(f), 46110.

On January 24, 2003, the TSA also served an Initial Notice of Threat Assessment designating Jifry and Zarie as security threats, and the FAA suspended their certificates. The pilots appealed the Initial Notice, and requested the materials upon which the Initial Notice had been issued. The TSA provided the releasable materials, but did not include the factual basis for TSA's determination, which was based on classified information. The pilots then appealed the suspension of their

certificates to the NTSB. The ALJ granted the TSA's motion for summary judgment, ruling that the only question was procedural - whether the pilots had been duly advised by the TSA, in writing, that they posed a security threat, and finding that they had. Upon the pilots' appeals, the NTSB affirmed the ALJ's order in favor of the TSA. Jifry and Zarie then filed replies to the TSA's Initial Notice, stating that the "lack of evidence and information about the basis for the determination contained in the TSA's response" made it impossible for them to specifically rebut the TSA's allegations, and denying that they were security threats. On May 8, 2003, the TSA Deputy Administrator, upon *de novo* review of the administrative record, denied the pilots' challenge to the Initial Notice and issued a Final Notice based on finding that Jifry and Zarie posed security threats. *See* 49 C.F.R. § 1540.117(c). The FAA then revoked the pilots' airman certificates. On August 13, 2003, the NTSB denied the pilots' appeal of the revocation of their certificates for the same reasons it had denied their challenges to the suspensions, and affirmed the ALJ's grant of summary judgment to the TSA and the emergency orders of revocation.

II.

The pilots make three challenges to the revocations of their FAA airman certificates: first, that the January 2003 regulations were unlawfully promulgated without notice and comment; second, that the revocations were not supported by substantial evidence in the record; and third, that the procedures provided by the January 2003 regulations violated their due process rights under the Fifth Amendment to the Constitution. We address each in turn.

Section 553 of the Administrative Procedure Act ("APA") requires an agency to publish a general notice of proposed rulemaking and to afford an opportunity for interested persons to participate in the rulemaking. *See* 5 U.S.C. § 553(b), (c). The

"good cause" exception, however, provides that "when the agency for good cause finds ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest," the agency need not engage in notice and comment. *Id.* § 553(b)(3)(B). The pilots contend that the regulations of January 2003 are invalid because they were unlawfully promulgated without notice and comment, and there was no rational basis for eliminating the right to a meaningful appeal before the NTSB. They maintain that the "good cause" exception does not apply because notice and comment had not been "impracticable, unnecessary or contrary to the public interest" inasmuch as the FAA already had the authority to immediately suspend or revoke a certificate upon finding that "safety in air commerce or air transportation and the public interest" required such an action. *See* 49 U.S.C. § 44709, *amended by* Pub. L. No. 108-176, 117 Stat. 2490 (2003).

Contrary to the position of respondents TSA, FAA, and the NTSB, the pilots' APA challenges to the FAA regulation, 14 C.F.R. § 61.18, are not mooted by the enactment of the Vision 100 - Century of Aviation Reauthorization Act ("Act"), 49 U.S.C. § 46111, on December 12, 2003. The Act provides that the FAA Administrator "shall issue an order ... suspending, or revoking any part of a certificate ... if the Administrator is notified by the Under Secretary for Border Transportation Security of the Department of Homeland Security that the holder of the certificate poses, or is suspected of posing, a risk of air piracy or terrorism or a threat to airline or passenger safety." 49 U.S.C. § 46111(a). The respondents maintain that through § 46111, Congress approved the certificate-revocation process embodied in the FAA regulation by expressly commanding the FAA to suspend or revoke certificates if requested by the TSA. The respondents have not shown a lack of a live controversy, however, because the effects of 14 C.F.R. § 61.18 remain very real for non-resident alien pilots like Jifry and Zarie. The FAA has applied this regulation against the two

pilots, and it remains in effect notwithstanding the Act. The pilots therefore retain "a legally cognizable interest in the outcome," *Powell v. McCormack*, 395 U.S. 486, 496 (1969), of their APA claims.

Generally, the "good cause" exception to notice and comment rulemaking, *see* 5 U.S.C. § 553(b)(3)(B), is to be "narrowly construed and only reluctantly countenanced." *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992) (quoting *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980)). The exception excuses notice and comment in emergency situations, *Am. Fed'n of Gov't Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981), or where delay could result in serious harm. *See Hawaii Helicopter Operators Ass'n v. FAA*, 51 F.3d 212, 214 (9th Cir. 1995). The latter circumstance is applicable here in examining the TSA's determination that "the use of notice and comment prior to issuance of the [January 2003 regulations] could delay the ability of TSA and the FAA to take effective action to keep persons found by TSA to pose a security threat from holding an airman certificate," and was "necessary to prevent a possible imminent hazard to aircraft, persons, and property within the United States."

The pilots contend that the "good cause" exception does not apply because the FAA already had unlimited power to revoke a certificate immediately if it believed an airman to be a security risk, *see* 49 U.S.C. § 44709, and the TSA was already authorized to make security assessments under 49 U.S.C. § 114(f). While true, the pilots fail to acknowledge that at the time the challenged regulations were adopted, the FAA's power to suspend or revoke certificates was permissive only. *See* 49 U.S.C. § 44709. Congress had not yet enacted 49 U.S.C. § 46111, which formalized the requirement that the FAA shall suspend, modify, or revoke a certificate if notified by the TSA that an individual posed a security risk. As the respondents explain, the January 2003 regulations mandated a

"streamlined process" by which an individual's pilot certificate would be automatically suspended or revoked by the FAA upon notification by the TSA that a pilot posed a security threat. The TSA and FAA deemed such regulations necessary "in order to minimize security threats and potential security vulnerabilities to the fullest extent possible." Given the respondents' legitimate concern over the threat of further terrorist acts involving aircraft in the aftermath of September 11, 2001, *see* Declaration of TSA Deputy Administrator Stephen McHale (hereinafter McHale Decl.) at 4, the agencies had "good cause" for not offering advance public participation. *See Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 754-55 (D.C. Cir. 2001).

On the merits, the pilots' APA challenge fails. The court's review of agency rulemaking is highly deferential, limited to determining "whether the agency has considered the relevant factors and articulated a 'rational connection between the facts found and the choice made.' " *United States Air Tour Ass'n v. FAA*, 298 F.3d 997, 1005 (D.C. Cir. 2002) (quoting *Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). In *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1221 (D.C. Cir. 1999), the court observed that "when ... an agency is obliged to make policy judgments where no factual certainties exist or where facts alone do not provide the answer, [the reviewing court's] role is more limited; we require only that the agency so state and go on to identify the considerations it found persuasive."

Contrary to the pilots' position, the regulations are not arbitrary and capricious for bearing no rational connection to the problem identified by the FAA. It is self-evident that the regulations are related to the TSA's and FAA's goals of improving the safety of air travel. Nor is the court in a position to second-guess the respondents' judgment that imposing stricter procedures for coordinating security risks and restricting individuals who pose security threats from holding

airman certificates was necessary to further that goal. *See BellSouth Corp. v. FCC*, 162 F.3d at 1221-22. Moreover, the pilots' contention that the risk posed by the certificate holders alleged to be security threats was not remedied by providing fewer procedural protections to the certification holders and narrowing their right to NTSB review is to no avail because 49 U.S.C. § 46111 produces the same result. Section 46111 makes no provision for NTSB review even for citizens, and the Conference Report states that non-resident aliens "have the right to the appeal procedures that [TSA] has already provided for them." H.R. Conf. Rpt. 108-334 at 152 (2003). In addition, § 46111(a) requires the FAA to respond automatically to TSA threat assessments, providing that the FAA "shall issue an order amending, modifying, suspending, or revoking any part of a certificate issued under this title if the Administrator is notified by ... the Department of Homeland Security that the holder of the certificate poses, or is suspected of posing, a risk of air piracy or terrorism or a threat to airline or passenger safety." 49 U.S.C. § 46111(a). Accordingly, if these pilots retain any right to NTSB review at all, it is no broader than the review for procedural regularity that they have received, and they would therefore garner no benefit from a remand. Indeed, an additional ground for rejecting the pilots' challenge to the promulgation of the FAA regulation without notice and comment exists precisely because § 46111 now provides an express statutory authorization for the automatic revocation that was previously predicated on the regulations alone; even were the court to invalidate the regulations for lack of notice and comment, the statute would compel the FAA to honor the TSA's notification and take immediate action against the pilots' certificates.

III.

The scope of the court's review of the pilots' challenges to the TSA's actions is limited to determining whether the actions were "arbitrary, capricious, an abuse of discretion, or otherwise

not in accordance with law." 5 U.S.C. § 706(2)(A). Under this standard, the court must consider whether those actions were "based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (*overruled on other grounds*). *See Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The court must affirm the agency's findings of fact if they are supported by "substantial evidence" and there is a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). "Substantial evidence" is simply such relevant evidence as a reasonable person might accept as proof of a conclusion. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1981) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

In contending that the revocations of their airman certificates are unsupported by substantial evidence in the record, the pilots do not challenge the definition of "security threat" under the TSA regulations. An individual poses a "security threat" if the individual "is suspected of posing, or is known to pose (1) A threat to transportation or national security; (2) A threat to air piracy or terrorism; (3) A threat to airline or passenger security; or (4) A threat to civil aviation security." 49 C.F.R. § 1540.117(c). Consistent with *Camp v. Pitts*, 411 U.S. 138, 143 (1973), where the Supreme Court stated that when an agency official fails to adequately explain its decision, the agency should submit "either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary," the affidavit of TSA Deputy Administrator Stephen McHale provides an adequate basis for the TSA's determination that Jifry and Zarie each posed a "security threat" within the meaning of § 1540.117(c). The unsealed affidavit recounts that the Deputy Administrator affirmed the TSA's determination on the basis of classified intelligence reports, combined with

reports from the intelligence community that aircraft would continue to be used as weapons of terrorism, and consideration of "the ease with which an individual may obtain access to aircraft in the United States once he or she has a pilot license." McHale Decl. at 4. The Deputy Administrator attested that "because it would be very difficult to avert harm once a terrorist had control of an aircraft, I concluded that it was important to err on the side of caution in determining whether [the two pilots] ... pose a security threat...." *Id.* at 4-5.

Viewing as a whole the record evidence before the TSA, including *ex parte in camera* review of the classified intelligence reports, we hold that there was substantial evidence to support the TSA's determination that the pilots were security risks. While we reject the pilots' contention that the court apply a *de novo* standard of review, we have carefully reviewed the classified intelligence reports on which TSA relied. The record is not lengthy and the basis for the TSA's conclusion is obvious. The court's review is limited, moreover, to the administrative record that was before the TSA when it determined that the pilots were security risks. *See 5 U.S.C. § 706*; *cf. United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963). Hence, the pilots' post-argument submission of May 3, 2004 is not properly before the court, although we note that the information it contains was known to the pilots in 2001 and could have, and still can be, submitted to the TSA.

The pilots' motion to bar the respondents' reliance on classified information in this court is not well-taken. Even assuming the respondents' failure to provide notice of its intention to rely on classified information on appeal until one month after the pilots filed their opening brief prevented the pilots from timely addressing the "classified information" question in their opening brief, the pilots' motion fails on its merits for several reasons. First, because the court reviewed the information designated by the respondents as "classified," the court is in a position to determine whether it was properly

classified without the *Vaughn* Index, *see Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973), that the pilots urge be obtained. Reliance on *Vaughn* is misplaced, in any event, because that case involved the Freedom of Information Act and presented a very different situation than that presented here. Second, the court has inherent authority to review classified material *ex parte, in camera* as part of its judicial review function. *See Molerio v. FBI*, 749 F.2d 815, 822 & n.2 (D.C. Cir. 1984). *See also Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 208-09 (D.C. Cir. 2001). The pilots' focus on the TSA Deputy Administrator's reliance on "sensitive security information," as defined by 49 U.S.C. § § 114(s), 40119(b)(1), and 49 C.F.R. Part 1520, and "law enforcement sensitive" information, *see* McHale Decl. at 5, fares no better. Although 49 C.F.R. § 1520.5(b) provides that a person has a "need to know sensitive security information" when the information is necessary to represent an individual in a judicial or administrative proceeding, § 1520.5(b)(5) applies only to individuals representing persons listed in § 1520.5(a), and the pilots are not among the persons listed in subsection (a) who are required to restrict disclosure of and access to sensitive security information to those with a "need to know." *See* 49 C.F.R. § 1520.5(a).

IV.

The court reviews *de novo* the pilots' challenge to the constitutionality of the procedures under the January 2003 regulations. *See Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 543 (1978); *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 377 (9th Cir. 2003); *Grace Towers Tenants Ass'n v. Grace Housing Dev. Fund Co.*, 538 F.2d 491, 496 (2d Cir. 1976). They contend that the TSA and FAA procedures violate the Fifth Amendment of the Constitution by depriving the

pilots of their property interest in their airman certificates without due process of law.

The Supreme Court has long held that non-resident aliens who have insufficient contacts with the United States are not entitled to Fifth Amendment protections. *See Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950); *Yamataya v. Fisher (Japanese Immigrant Case)*, 189 U.S. 86, 101 (1903); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). *See also United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936); *Pauling v. McElroy*, 278 F.2d 252, 253 n.3 (D.C. Cir. 1960). *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990). Exceptions may arise where aliens have come within the territory of the United States and established "substantial connections" with this country, *Verdugo-Urquidez*, 494 U.S. at 271, or "accepted some societal obligations." *Id.* at 273. In such situations, the Court has recognized that aliens may be accorded protections under the Constitution. *See Plyler v. Doe*, 457 U.S. 202, 211-12 (1982); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931). This court has applied these principles in a series of cases concerning the designation of certain dissident organizations as "foreign terrorist organizations." *See People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1241 (D.C. Cir. 2003) ("*People's Mojahedin II*"); *Nat'l Council*, 251 F.3d at 201; *People's Mojahedin Org. of Iran v. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999) ("*People's Mojahedin I*"). *See also 32 County Sovereignty Comm. v. Dep't of State*, 292 F.3d 797, 799 (D.C. Cir. 2002). In *People's Mojahedin I*, 182 F.3d at 22, the court explained that "[a] foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise." We need not decide whether or not Jifry and Zarie are entitled to constitutional protections because, even assuming that they are, they have received all the process that they are due under our precedent.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Generally, in determining whether administrative procedures are constitutionally adequate, courts weigh three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. The pilots' interests at stake here - their interest in possessing FAA airman certificates to fly foreign aircraft outside of the United States - pales in significance to the government's security interests in preventing pilots from using civil aircraft as instruments of terror. As the Supreme Court has noted, "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)). Whatever the risk of erroneous deprivation, the pilots had the opportunity to file a written reply to the TSA's initial determination and were afforded independent *de novo* review of the entire administrative record by the Deputy Administrator of the FAA, *see* 49 C.F.R. § 1540.117(e)(4), (f), and *ex parte, in camera* judicial review of the record. In light of the governmental interests at stake and the sensitive security information, substitute procedural safeguards may be

impracticable, and in any event, are unnecessary under our precedent.

In *Nat'l Council of Resistance of Iran*, 251 F.3d at 208, the court concluded that in designating organizations as foreign terrorist organizations under the Anti-Terrorism and Effective Death Penalty Act, the Secretary of State had to "afford to the entities under consideration notice that the designation is impending," *id.*, and "the opportunity to present, at least in written form, such evidence as those entities may be able to produce to rebut the administrative record or otherwise negate the proposition that they are foreign terrorist organizations." *Id.* at 209. In light of the Supreme Court's instruction that "due process is flexible and calls for such procedural protections as the particular situation demands," *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), the court held that because of the extent to which security concerns were implicated in that case, the Secretary could upon "adequate showing to the court," provide the requisite notice after the designation of the organization as a terrorist organization, and needed only to disclose the unclassified portions of the record. *Nat'l Council of Resistance of Iran, 251 F.3d at 208. In People's Mojahedin II, 327 F.3d at 1242-43*, another case involving the designation of terrorist organizations, the court underscored that it "had established in [*National Council*] the process which is due under the circumstances of this sensitive matter of classified intelligence in the effort to combat foreign terrorism," and that "nothing further is due." *Id. See also Holy Land, 333 F.3d at 163-64.*

The TSA Assistant Administrator's Initial Notices informed the pilots that "based upon materials available to the [TSA], which I have personally reviewed, I have determined that you pose a security threat." The pilots were afforded an opportunity to respond to the designation and both filed written challenges to the TSA's Initial Notice, along with affidavits that they did not pose a threat to aviation or national security. *See* 49 C.F.R. § 1540.117(e)(4). These materials were considered by the TSA

Deputy Administrator when he conducted a *de novo* review of the administrative record before issuing the Final Notice. While the pilots protest that without knowledge of the specific evidence on which TSA relied, they are unable to defend against the charge that they are security risks, the court has rejected the same argument in the terrorism listing cases. The due process protections afforded to them parallel those provided under similar circumstances in *National Council* and *People's Mojahedin II*, and are sufficient to satisfy our case law.

Accordingly, we affirm the NTSB revocation order of August 13, 2003, and deny the petitions for review and the pilots' motion to bar the respondents' reliance on classified information.

APPENDIX B

SERVED: August 14, 2003
NTSB Order No. EA-5052

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 13th day of August, 2003

MARION C. BLAKEY,
Administrator,
Federal Aviation Administration,
Complainant,

v.

Dockets SE-16922
and SE-16923

TAREK HASSAN JIFRY and
MAAN HASSAN ZARIE,
Respondents.

OPINION AND ORDER

The respondents have appealed from an order Administrative Law Judge Patrick G. Geraghty served in this proceeding on July 15, 2003.[1] That order granted the Administrator's motion for summary judgment on emergency orders she had issued on June16, 2003, revoking any airman certificate held by respondents, including Airline

[1]A copy of the law judge's order is attached. 7579

Transport Pilot Certificates (No. 2293881 and No. 2339384, held by respondents Zarie and Jifry, respectively), pursuant to section 61.18(a) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 61). The consolidated appeal will be denied.

Individuals that the Transportation Security Administration (TSA) has determined pose a security threat are not eligible to hold an airman certificate, rating, or authorization under FAR Part 61.[2] Because TSA has made such determinations with respect to both of the respondents, the law judge concluded that the Administrator's revocation orders were required under the terms of her regulation. In so concluding, the law judge relied on recent Board precedent, involving appeals from the same two respondents, which unequivocally held that the Board does not have jurisdiction to review the validity of TSA security threat assessments entered under authority given to it in the Aviation and Transportation Security Act.[3]

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[2]FAR section 61.18 provides as follows:

§ 61.18 Security Disqualification.

(a) *Eligibility Standard.* No person is eligible to hold a certificate, rating or authorization issued under this part when the Transportation Security Administration (TSA) has notified the FAA in writing that the person poses a security threat.

(b) *Effect of the Issuance by the TSA of an Initial Notification of Threat Assessment.* The FAA will suspend any certificate, rating, or authorization issued under this part after the TSA issues to the holder an Initial Notification of Threat Assessment.

[3]*Administrator v. Zarie*, NTSB Order No. EA-5033 (April 1, 2003), and *Administrator v. Jifry*, NTSB Order No. EA-5034 (April 1, 2003). These appeals challenged emergency suspensions predicated on preliminary security threat assessments TSA had made concerning the respondents. See FAR section 61.18(b). The instant appeals involve TSA's final judgments that the respondents pose security threats.

Respondents' renewed position in this round of appeals that they are entitled to a hearing before the Board on the factual basis for TSA's threat assessment rests in effect on the same arguments that the law judge and the Board found unpersuasive in their earlier cases. We perceive no need to revisit those arguments, for, in our view, they do not establish that the Board is mistaken in its view that "where, as in this matter, the Administrator has incorporated in a regulation a judgment about the eligibility for airman certification of a class of persons that another federal agency has identified as presenting a risk to aviation security, the Board has no authority to look behind that choice." *Zarie, supra*, at 3. The law judge's ruling must therefore be sustained.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondents' appeal is denied; and

2. The order of the law judge granting summary judgment for the Administrator and affirming the emergency orders of revocation is affirmed.

ENGLEMAN, Chairman, ROSENKER, Vice Chairman, and GOGLIA and HEALING, Members of the Board, concurred in the above opinion and order. CARMODY, Member, did not concur, and submitted the following dissenting statement.

> I had misgivings about notations 7541 and 7542 (Zarie and Jifry) when the Board considered them a few months ago. The Board was asked to affirm that the respondents held airmen certificates and that the Transportation Security Administration (TSA) had notified the Administrator that the

two men posed a security threat. The law judge concluded that the NTSB lacked the jurisdictional authority to review the TSA's determination. Although I voted to approve the judge's decision and the revocation order, I filed a statement saying my decision did not reflect any judgment on the TSA process or determination since everything was based on information which we had neither received nor had authority to review.

Now the second round of appeals comes before us with notation 7579. The respondents are seeking a hearing on the factual basis for the TSA's assessment. The proposed opinion and order denies the appeal citing, once again, that the Board lacks jurisdiction to review the TSA assessment.

I will not approve this opinion and order and I regret my earlier vote on 7541 and 7542. I agree that the NTSB does not have jurisdiction. Why then should we exercise judgment over something we have absolutely no information about? No intellectual power is required to agree that the individuals had certificates and that the TSA notified the FAA that the men were a security threat. There is no question about these facts. If this is the appeal process, it is flawed and senseless. Approving such an order gives it a legitimacy that it doesn't deserve. Further, it does not seem responsive to the request for review.

I do not believe the NTSB is the correct body to review cases of this type.

National security is not within the NTSB's jurisdiction. Cases like these put the Board in the position of having to pass judgment where the facts are unavailable, and the possibility of exercising meaningful review does not exist.

SERVED JULY 15, 2003

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

MARION C. BLAKEY,
Administrator,
Federal Aviation Administration,
Complainant,

v.

TAREK HASSAN JIFRY and
MAAN HASSAN ZARIE,
Respondents.

EMERGENCY

Docket No.: SE-16922
Docket No.: SE-16923
CONSOLIDATED
JUDGE GERAGHTY

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DECISIONAL ORDER

These proceedings are before the Board on the respective Appeals of Respondents from their individual Emergency Order of Revocation, herein the Complaints,

which, in each instance, seeks to revoke the Airline Transport Pilot and any other airman Certificates held by them.

For the reasons and circumstances stated in the Complaints,[1] it is further alleged that by consequence of the provisions of Section 61.18(a), Federal Aviation Regulations (FARs),[2] Respondents are not eligible to hold any airman certificate.

Complainant has filed a Motion for Summary Judgment in each of the consolidated cases. Summary Judgment is appropriate where the pleadings reveal that there are material facts in dispute as would require trial for resolution. Attached to the Motions is a copy of the May 8, 2003 letter addressed to each Respondent, individually, from the Transportation Security Administration (TSA), advising and giving notice of TSA's Final Threat Assessment that Respondents pose a security threat. The attachment also indicated that a copy of that May 8, 2003 *TSA Final Notification of Threat Assessment,* in each case, was served upon the Administrator, Federal Aviation Administration (FAA).[3]

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[1]Copies of the respective Emergency Orders of Revocation are attached as Exhibit 1.

[2]Section 61.18(a), FAR, *Security Disqualification*, provides:

(a) (a) Eligibility Standard. No person is eligible to hold a certificate rating or authorization issued under this part when the Transportation Security Administration (TSA) has notified the FAA in writing that the person poses a security threat.

[3]Complainant also moved to amend her Order (Complaint) in *Jifry* to correct error in dates cited in Paragraph 2 therein from that of: May 6, 2003, to that of: May 8, 2003. The error appears harmless as Respondent would have knowledge of the correct date and, further, appears as merely typographical. The Motion to Amend is granted.

Answers were filed on behalf of the Respondents and therein the allegation of Paragraph 1 was admitted, while denial was entered as to Paragraphs 2 and 3. In their denial of Paragraph 2, the Respondents deny that they present a security threat. Such denial, however, does not address the essential allegation of Paragraph 2; that is, whether or not TSA advised both the Respondent and Administrator FAA, by letter of May 8, 2003, of TSA's final threat assessment. Paragraph 3 is, on its face, a conclusionary statement of law for the Board to resolve upon the material facts established herein.

Counsel for Respondents has filed a joint response in opposition to Complainant's Motion. In their response, Respondents advance basically the same argument that they raised in the prior cases before the Board.[4] The crucial issue raised is that of the Board's jurisdiction as pertains to review of the TSA's determination of Respondents' threat status, and, secondly, whether the established facts confirm the operative provisions of the FAR cited by Complainant as the basis of the FAA's action to revoke.

Those arguments were definitely addressed by the Board in its *Opinion and Order* in *Administrator v. Zarie,* EA-5033; therefore, extensive exposition is herein unnecessary. In *Zarie*, the Board explained that its "... authority to review the validity of or justification for a certificate action is not absolute ... but is circumscribed ... by the regulatory contest..."[5] The Board further held that where the FAA has incorporated in its Regulation (FAR) as it has in Section 61.18, FAR, its judgment on airman eligibility

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[4] *Administrator v. Jifry,* SE-16794; EA-5034 (2003); *Administrator v. Zarie,* SE-16793; EA-5033 (2003).

[5] *Administrator v. Zarie,* SE-16793; EA-5033, at 2 (2003).

based upon another federal agency's determination that "the person(s) present a risk to aviation security, ... the Board has no authority to look behind that choice..."[6] As the Board stated in *Zarie*, the issue in the reviewable issue "... is simply whether the evidence supports the Administrator's allegation ... in terms of the applicable Regulation, and if it does, "... our (the Board's) inquiry is ended and the appeal fails..."[7]

Summary judgment is appropriate where the record in the proceeding demonstrates that there does not exist any material issue of fact remaining in dispute. Upon review and consideration of all pleadings submitted and supporting attachments, it is determined that the material facts in the respective Complaints are established on the preponderance of evidence and, thus, no material facts remain for resolution. I find and concede, therefore, upon the record in its entirety and Board precedent that, as the evidence clearly establishes that the elements of Section 61.18, FARS, are proven, the required conclusion is that Respondents' Airman Certificates, by terms of said Regulation, must be held to be revoked.

It is held, accordingly, that Complainant's Motions for Summary Judgment are granted; the Complaints/Orders of Revocation are affirmed; and these proceedings are terminated.[8]

SO ORDERED.

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[6]Id at 3.

[7]Supra, note 5 at 3.

[8]The Affirmative Defenses raised in Respondents' Answers are not issue reviewable; they are to be viewed as raised and preserved for any further appeal aczion.

ENTERED this 15th day of July 2003 at Denver, Colorado.

/s/ Patrick G. Geraghty
PATRICK G. GERAGHTY
ADMINISTRATIVE LAW JUDGE

SERVED: April 1, 2003
NTSB Order No. EA-5033

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 1st day of April, 2003

MARION C. BLAKEY,
Administrator,
Federal Aviation Administration,
Complainant,

v. Docket SE-16793

MAAN HASSAN ZARIE,
Respondent.

OPINION AND ORDER

The respondent has appealed from an order Administrative Law Judge Patrick G. Geraghty served in this proceeding on March 17, 2003.[1] That order granted the Administrator's motion for summary judgment on an emergency order she had issued on January 24, 2003, suspending, indefinitely, any airman certificate held by respondent, including his Airline Transport Pilot Certificate (No. 2293881), pursuant to section 61.18 of the Federal

[1]A copy of the law judge's decision is attached. 7541

Aviation Regulations ("FAR," 14 C.F.R. Part 61). The appeal will be denied.

Briefly stated, newly enacted FAR section 61.18 requires, on receipt of written notification by the Transportation Security Administration (TSA), that the Administrator suspend any airman certificate held by an individual who the TSA has determined poses a security threat. The law judge ruled, after considering essentially the same arguments that the respondent presses on appeal to us, that the Board does not have jurisdiction to review the validity of the TSA security threat assessment. Rather, the Board's authority is limited to determining whether the Administrator's action complies with the terms of her regulation, which is not in dispute in this matter. We see no need to expand at length upon the law judge's resolution of the question of jurisdiction, for we agree with his decision, which adequately discusses all of the relevant facts and legal issues.

The Board's authority to review the validity of or justification for a certificate action is not absolute, as respondent suggests, but is circumscribed, if not defined, by the regulatory context. For example, the Board is empowered to review the denial by the Administrator of a medical certificate, but that review is abbreviated where the reason for denial is the history or existence of a medical circumstance or condition, such as, for instance, cardiac valve replacement, that is per se disqualifying under the Administrator' s medical regulations (see 14 C.F.R. Part 67) . The issue in such a case is not whether the Board agrees that the medical condition the individual is alleged to have is one that is not compatible with flight safety or should always be disqualifying. Rather, the issue is simply whether the

evidence supports the Administrator's allegation.[2] If it does, our inquiry is ended, and the appeal fails.

Similarly, where, as in this matter, the Administrator has incorporated in a regulation a judgment about the eligibility for airman certification of a class of persons that another federal agency has identified as presenting a risk to aviation security, the Board has no authority to look behind that choice. Whether the Administrator's regulation represents a sustainable exercise of her rulemaking authority and whether the TSA's procedure for challenging a security threat judgment accord individuals all rights to which they are entitled as a matter of due process are questions reserved for the courts to decide.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied; and

2. The order of the law judge granting summary judgment for the Administrator and affirming the emergency order of suspension is affirmed.

ENGLEMAN, Chairman, and GOGLIA, CARMODY, ROSENKER, and HEALING, Members of the Board, concurred in the above opinion and order. Member CARMODY submitted the following concurring statement, in which Member GOGLIA joined.

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[2]In these cases, it would be of no significance, for purposes of the Board's review authority, that reasonable medical minds might have differed over the necessity for an individual's valve replacement. The Board does not provide a forum either for second-guessing the Administrator's determination that those with replaced heart valves should not be certificated to fly or for re-litigating the wisdom of medical judgments of those who determined that the surgery was necessary.

The decision here does not reflect any judgment either on the process TSA, in concert with the Administrator, has put in place to enhance aviation security by de-certifying airmen who pose a security threat, or on TSA's threshold determination that the respondent in this case may present such a risk. The decision recognizes that the validity of the TSA assessment does not fall within the scope of our statutory charter.

SERVED: April 1, 2003
NTSB Order No. EA-5034

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 1st day of April, 2003

MARION C. BLAKEY,
Administrator,
Federal Aviation Administration,
Complainant,

v. Docket SE-16794

TAREK HASSAN JIFRY,
Respondent.

ORDER

We have today issued an opinion and order in *Administrator v. Zarie*, NTSB Order No. EA-5033 (served April 1, 2003), a case also decided by Administrative Law Judge Patrick G. Geraghty that involves the identical factual setting, allegations, and legal issues as are posed by this

appeal.[1] For the reasons set forth in *Zarie*, we affirm the law judge's grant, in the same language, of summary judgment for the Administrator in this proceeding.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied; and

2. The order of the law judge affirming the emergency suspension of respondent Jifry's Airline Pilot Certificate No. 2339384 under section 61.18 of the Federal Aviation Regulations is affirmed.

ENGLEMAN, Chairman, and GOGLIA, CARMODY, ROSENKER, and HEALING, Members of the Board, concurred in the above opinion and order. Member CARMODY submitted the following concurring statement, in which Member GOGLIA joined.

> The decision here does not reflect any judgment either on the process TSA, in concert with the Administrator, has put in place to enhance aviation security by de-certifying airmen who pose a security threat, or on TSA's threshold determination that the respondent in this case may present such a risk. The decision recognizes that the validity of the TSA assessment does not fall within the scope of our statutory charter.

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[1] A copy of the law judge's decision is attached, as is a copy of the Board's opinion and order in the *Zarie* case.

SERVED MARCH 17, 2003

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

MARION C. BLAKEY,
Administrator,
Federal Aviation Administration,
Complainant,

v.

Docket No.: SE-16794
JUDGE GERAGHTY

TAREK HASSAN JIFRY,
Respondent.

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DECISIONAL ORDER

This proceeding comes before the National Transportation Safety Board (the Board) on the Appeal of

Tarek Hassan Jifry, herein Respondent, for review of the Emergency Order of Suspension, as amended, issued against Respondent by the Administrator, Federal Aviation Administration (FAA), the Complainant. That Order, issued on an emergency basis, suspended, effective as of the date of said Order, the Respondent's Airline Transport Pilot Certificate, and any other airman certificate held, for an indefinite period of time.

The Complainant's action against Respondent's Airman Certificates is based upon the allegations stated in its Emergency Order of Suspension,[1] the Complaint herein, and the provisions of Section 61.18, Federal Aviation Regulations (FARs).[2]

As this proceeding raised issues of first impression to the Board, an Order was entered soliciting from the Parties their Briefs expressing their respective views of the Board's adjudicatory authority, and scope of review on the subject matter of this proceeding. The Parties have submitted Briefs and also their responses to the opposing Briefs. Those initial

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[1]Complainant's Amended Emergency Order of Suspension (the Complaint).

[2]Section 61.18 FARs, Security Disqualification, provides as pertinent herein:

(a) (a) *Eligibility Standard.* No person is eligible to hold a certificate, rating or authorization issued under this part when the Transportation Security Administration (TSA) has notified the FAA in writing that the person poses a security threat.

(b) (b) *Effect of the Issuance by the TSA of an Initial Notification of Threat Assessment.* (2) The FAA will suspend any certificate, rating, or authorization issued under this part after the TSA issues to the holder an Initial Notification of Threat Assessment.

Briefs, the replies and attachments have been duly reviewed and considered.

The Complainant issued her Order (Complaint) after receiving, by letter dated January 24, 2003, issued by the Transportation Security Administration (TSA), to both Respondent and FAA, the TSA's *Initial Notification of Threat Assessment*[3] by which TSA advised that it had determined Respondent poses a security threat. The action taken by TSA is within its authority as provided by provisions of the *Aviation and Transportation Security Act* (ATSA) and TSA's Regulations.[4]

Upon review of the ATSA and the TSA Regulations, it is determined that neither contains any language extending the Board's adjudicatory authority for the Board to review the determinations, actions taken by TSA concerning Respondent. Absent an express statutory grant of adjudicatory authority, one administrative agency, herein the Board, does not have the authority to review determinations and/or actions taken by another independent agency/administration, i.e., TSA. I conclude, therefore, that the Board does not possess direct jurisdictional authority to review the TSA's action and determination concerning the Respondent as allegedly posing a security threat.[5]

The Complainant has issued her Emergency Order of Suspension, as amended, the Complaint, in accordance with

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[3]Complainant's Motion for Summary Judgment, Exhibit D.

[4]ATSA, Public Law 107-7 (2001); 49 USC 114, 49 CFR 1540.117.

[5]On review, it is concluded that there is no provision of the *Independent Safety Board Act*, 1984 (49 USC 1133) that can be construed as extending review authority to the Board over TSA's determinations.

authority delegated and vested in Complainant pursuant to 49 USC 44709, 46105. As provided by 49 USC 44709(d)(1), Respondent has appealed to the Board from that Order/Complaint, and as further provided, the Board, as pertinent here, may modify or reverse the Complainant's Order after Hearing wherein the Board is not bound by the findings of fact of the Administrator FAA, providing only that the Board is bound by all validly adopted laws and regulations the Administrator is charged with carrying out, 49 USC 44709(d)(3).

In the conduct of its proceeding, the Board's authority is restricted to the question of whether the public interest and safety require affirmation of the Administrator's Order. In its proceeding, the Board does not have the authority to consider arguments directed to the constitutionality of FAA Regulations, nor to pass upon either the reasonableness, or validity, of said Regulations, but, rather, is limited to review of the Administrator FAA's findings of fact and action thereunder.[6] In the exercise of its review authority, therefore, the Board is limited to determination of whether the allegations of the particular Complaint/Order are established by a preponderance of evidence and whether such evidence confirms the operative provisions of the particular FAR relied upon by the FAA in taking action against the particular Respondent.[7]

In the instant case, accordingly, to determine what "facts" the Board is to review in its adjudicatory proceeding, it is necessary to begin with consideration of the provisions of the FAR upon which Complainant relies in this matter,

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[6] *Administrator v. Komjathy,* 5 NTSB 140, 142 (1986).

[7] *Administrator v. Lloyd,* 1 NTSB 1826, 1828 (1972); *Administrator v. Ewing,* 1 NTSB 1192, 1194 (1971).

i.e., Section 61.18(a)(2) FARs. The operative fact under that FAR is whether or not the Administrator/Complainant has been advised, in writing, by TSA that Respondent poses a security threat. Of course, as the Board is not bound by FAA's findings of fact, in any particular case, an airman may challenge and prevail if the evidence showed that the TAS [sic] had failed to notify FAA in writing of issuance of its initial threat assessment. Neither 49 USC 44709(a)(3), the provisions of Section 61.18(a)(2), nor Board precedent expand the Board's adjudicatory authority in the instant proceeding as to permit the Board to go behind the operative provisions of that FAR. If the Board were to attempt to review the basis for TSA's threat assessment, the Board would improperly, as discussed above, be extending its review authority to actions and determinations of an agency/administration, TSA, in absence of a statutory or regulatory grant of authority. I conclude, therefore, that in this proceeding the Board's adjudicatory authority extends only to whether Complainant has been advised by the TSA, in writing, that Respondent poses a security threat, that is, has FAA received an Initial Notification of Threat Assessment concerning Respondent?

Complainant has filed a Motion seeking Summary Judgment with attached supporting material. Respondent has submitted his Brief in opposition thereto. Those pleadings have, as has the entire record, been duly reviewed and considered.

Summary judgment is warranted where the record demonstrates that there does not exist any material issue of fact remaining as would necessitate trial for resolution. The opposing party may not rest upon mere allegations, or a general denial to defeat the pending Motion, but, rather, must set forth specific facts demonstrating that there is a genuine issue of material fact in dispute.

Upon examination of Respondent's Reply Brief and his Answer, it is determined that the material facts alleged in the Complaint are not in dispute.[8] Hence, upon the entire record, it is found that there does not remain in dispute any material fact. Further, upon such review, in conjunction with consideration of the elements of the cited FARs, Section 61.18(a)(2), it is concluded and held that it is established that the cited FAR and the established record requires the conclusion, which I reach, that Respondent is suspended from holding an airman certificate.

On this record and finding, it is further held that Complainant's Motion for Summary Judgment must be and hereby is granted, the Complaint is affirmed, and this proceeding terminated.[9]

SO ORDERED.

ENTERED this 17th day of March 2003 at Denver, Colorado.

/s/ Patrick G. Geraghty
PATRICK G. GERAGHTY
ADMINISTRATIVE LAW JUDGE

---

[8]Respondent's denial that he received "substantive notice" is deemed insufficient to rebut the TSA's January 24, 2003 letter: Initial Notification of Threat Assessment, receipt of which is not denied. Respondent's denial that he poses a security threat does not dispute the allegation contained in Paragraph 5 of the Complaint. Further, Exhibit D, Complainant's Motion, establishes that TSA advised FAA.

[9]The Affirmative Defenses raised in Respondent's Answer are not issues reviewable; however, they are to be considered as raised and preserved for any further appeal purposes.

[LOGO]
U.S. Department of Transportation

800 Independence Avenue
Washington, D.C. 20591

Federal Aviation Administration

CERTIFIED MAIL - RETURN RECEIPT REQUESTED AND FACSIMILE

January 29, 2003

Tarek Hassan Jifry
c/o Thomas J. Whalen, Esq.
Condon & Forsyth LLP
1016 Sixteenth St. N.W.
Washington, D.C. 20036

Re: Case No. 2003AGC10003

AMENDED EMERGENCY ORDER OF SUSPENSION

Based upon an investigation and by reason of the following circumstances the Administrator of the Federal Aviation Administration (FAA) has determined the following:

1. You are now, and at all times mentioned herein, were the holder of Airline Transport Certificate No. 2339384, with Airplane Multi-engine Land Rating and B-737, B-747, and DC-9 Type Ratings, issued under part 61 of the Federal Aviation Regulations, 14 C.F.R. part 61; an Airplane Single-engine Land Rating is attached to the private pilot privileges of Airline Transport Certificate No. 2339384.

2. On January 21, 2003, the FAA and the Transportation Security Administration (TSA) issued final

rules, which were placed on display at the Federal Register on January 22, 2003. The rules became effective on January 24, 2003.

3. The TSA, which published two final rules, has established a process for notifying an individual that he or she has been determined to pose a security threat and to advise the FAA of its determination. One rule prescribes the process that applies to aliens (Attachment A); the other rule applies to citizens of the United States of America (Attachment B).

4. That portion of the FAA rule that pertains to airman pilot certificates, which will be codified at 14 C.F.R. § 61.18 (Attachment C), expressly makes a person ineligible to hold such a certificate if the TSA notifies the FAA in writing that the person poses a security threat.

5. On January 24, 2003, the Assistant Administrator for Intelligence of TSA informed the FAA that upon his personal review of materials available to TSA, he has "determined that you pose a security threat." The Assistant Administrator further informed you of the process available under 49 C.F.R. § 1540.117 to challenge the TSA's Initial Notification.

6. As a result of the TSA Assistant Administrator's Initial Notification of Threat Assessment described above, you are not eligible under Section 61.18 of the Federal Aviation Regulations, 14 C.F.R. § 61.18, to hold an airman certificate, rating, or authorization issued under Part 61.

By reason of the foregoing facts and circumstances, the Administrator has determined that you presently lack the qualifications required of the holder of an airman certificate. The Administrator also has determined that safety in air

commerce or air transportation and the public interest require the indefinite suspension of any airman certificate held by you, including your Airline Transport Certificate No. 2293881 [sic]. Furthermore, the Administrator finds that an emergency exists and that safety in air commerce or air transportation and the public interest require the immediate effectiveness of this Order.

NOW, THEREFORE, IT IS ORDERED, pursuant to the authority vested in the Administrator by 49 U.S.C. §§ 44709(b)(1)(A) and 46105(c), that:

1. Any airman certificate held by you, including your Airline Transport Certificate No. 2293881 [sic], is suspended for an indefinite period of time.

2. Such suspension shall become effective as of the date of this order.

/s/ James W. Whitlow

James W. Whitlow
Deputy Chief Counsel

SERVED MARCH 17, 2003

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

MARION C. BLAKEY,
Administrator,
Federal Aviation Administration,
Complainant,

v.

Docket No.: SE-16793
JUDGE GERAGHTY

MAAN HASSAN ZARIE,
Respondent.

SERVICE:
BY FAX & REGULAR MAIL
ALLAN HOROWITZ, ESQ.
MANAGER, ENFORCEMENT DIV.
FAA/AGC-300, OFFICE OF CHIEF COUNSEL
800 INDEPENDENCE AVE., SW
WASHINGTON, DC 20591

BY FAX & OVERNIGHT MAIL
THOMAS WHALEN, ESQ.
EVELYN SAHR, ESQ.
JIM EHRIG, ESQ.
CONDON & FORSYTH, LLP
1016 16TH ST., NW
WASHINGTON, DC 20036

DECISIONAL ORDER

This proceeding comes before the National Transportation Safety Board (the Board) on the Appeal of

Maan Hassan Zarie, herein Respondent, for review of the Emergency Order of Suspension, as amended, issued against Respondent by the Administrator, Federal Aviation Administration (FAA), the Complainant. That Order, issued on an emergency basis, suspended, effective as of the date of said Order, the Respondent's Airline Transport Pilot Certificate, and any other airman certificate held, for an indefinite period of time.

The Complainant's action against Respondent's Airman Certificates is based upon the allegations stated in its Emergency Order of Suspension,[1] the Complaint herein, and the provisions of Section 61.18, Federal Aviation Regulations (FARs).[2]

As this proceeding raised issues of first impression to the Board, an Order was entered soliciting from the Parties their Briefs expressing their respective views of the Board's adjudicatory authority, and scope of review on the subject matter of this proceeding. The Parties have submitted Briefs and also their responses to the opposing Briefs. Those initial

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[1]Complainant's Amended Emergency Order of Suspension (the Complaint).

[2]Section 61.18 FARs, Security Disqualification, provides as pertinent herein:

(a) (a) *Eligibility Standard.* No person is eligible to hold a certificate, rating or authorization issued under this part when the Transportation Security Administration (TSA) has notified the FAA in writing that the person poses a security threat.

(b) (b) *Effect of the Issuance by the TSA of an Initial Notification of Threat Assessment.* (2) The FAA will suspend any certificate, rating, or authorization issued under this part after the TSA issues to the holder an Initial Notification of Threat Assessment.

Briefs, the replies and attachments have been duly reviewed and considered.

The Complainant issued her Order (Complaint) after receiving, by letter dated January 24, 2003, issued by the Transportation Security Administration (TSA), to both Respondent and FAA, the TSA's *Initial Notification of Threat Assessment*[3] by which TSA advised that it had determined Respondent poses a security threat. The action taken by TSA is within its authority as provided by provisions of the *Aviation and Transportation Security Act* (ATSA) and TSA's Regulations.[4]

Upon review of the ATSA and the TSA Regulations, it is determined that neither contains any language extending the Board's adjudicatory authority for the Board to review the determinations, actions taken by TSA concerning Respondent. Absent an express statutory grant of adjudicatory authority, one administrative agency, herein the Board, does not have the authority to review determinations and/or actions taken by another independent agency/administration, i.e., TSA. I conclude, therefore, that the Board does not possess direct jurisdictional authority to review the TSA's action and determination concerning the Respondent as allegedly posing a security threat.[5]

The Complainant has issued her Emergency Order of Suspension, as amended, the Complaint, in accordance with

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[3]Complainant's Motion for Summary Judgment, Exhibit D.

[4]ATSA, Public Law 107-7 (2001); 49 USC 114, 49 CFR 1540.117.

[5]On review, it is concluded that there is no provision of the *Independent Safety Board Act*, 1984 (49 USC 1133) that can be construed as extending review authority to the Board over TSA's determinations.

authority delegated and vested in Complainant pursuant to 49 USC 44709, 46105. As provided by 49 USC 44709(d)(1), Respondent has appealed to the Board from that Order/Complaint, and as further provided, the Board, as pertinent here, may modify or reverse the Complainant's Order after Hearing wherein the Board is not bound by the findings of fact of the Administrator FAA, providing only that the Board is bound by all validly adopted laws and regulations the Administrator is charged with carrying out, 49 USC 44709(d)(3).

In the conduct of its proceeding, the Board's authority is restricted to the question of whether the public interest and safety require affirmation of the Administrator's Order. In its proceeding, the Board does not have the authority to consider arguments directed to the constitutionality of FAA Regulations, nor to pass upon either the reasonableness, or validity, of said Regulations, but, rather, is limited to review of the Administrator FAA's findings of fact and action thereunder.[6] In the exercise of its review authority, therefore, the Board is limited to determination of whether the allegations of the particular Complaint/Order are established by a preponderance of evidence and whether such evidence confirms the operative provisions of the particular FAR relied upon by the FAA in taking action against the particular Respondent.[7]

In the instant case, accordingly, to determine what "facts" the Board is to review in its adjudicatory proceeding, it is necessary to begin with consideration of the provisions of the FAR upon which Complainant relies in this matter,

---

[6] *Administrator v. Komjathy,* 5 NTSB 140, 142 (1986).

[7] *Administrator v. Lloyd,* 1 NTSB 1826, 1828 (1972); *Administrator v. Ewing,* 1 NTSB 1192, 1194 (1971).

i.e., Section 61.18(a)(2) FARs. The operative fact under that FAR is whether or not the Administrator/Complainant has been advised, in writing, by TSA that Respondent poses a security threat. Of course, as the Board is not bound by FAA's findings of fact, in any particular case, an airman may challenge and prevail if the evidence showed that the TAS [sic] had failed to notify FAA in writing of issuance of its initial threat assessment. Neither 49 USC 44709(a)(3), the provisions of Section 61.18(a)(2), nor Board precedent expand the Board's adjudicatory authority in the instant proceeding as to permit the Board to go behind the operative provisions of that FAR. If the Board were to attempt to review the basis for TSA's threat assessment, the Board would improperly, as discussed above, be extending its review authority to actions and determinations of an agency/administration, TSA, in absence of a statutory or regulatory grant of authority. I conclude, therefore, that in this proceeding the Board's adjudicatory authority extends only to whether Complainant has been advised by the TSA, in writing, that Respondent poses a security threat, that is, has FAA received an Initial Notification of Threat Assessment concerning Respondent?

Complainant has filed a Motion seeking Summary Judgment with attached supporting material. Respondent has submitted his Brief in opposition thereto. Those pleadings have, as has the entire record, been duly reviewed and considered.

Summary judgment is warranted where the record demonstrates that there does not exist any material issue of fact remaining as would necessitate trial for resolution. The opposing party may not rest upon mere allegations, or a general denial to defeat the pending Motion, but, rather, must set forth specific facts demonstrating that there is a genuine issue of material fact in dispute.

Upon examination of Respondent's Reply Brief and his Answer, it is determined that the material facts alleged in the Complaint are not in dispute.[8] Hence, upon the entire record, it is found that there does not remain in dispute any material fact. Further, upon such review, in conjunction with consideration of the elements of the cited FARs, Section 61.18(a)(2), it is concluded and held that it is established that the cited FAR and the established record requires the conclusion, which I reach, that Respondent is suspended from holding an airman certificate.

On this record and finding, it is further held that Complainant's Motion for Summary Judgment must be and hereby is granted, the Complaint is affirmed, and this proceeding terminated.[9]

SO ORDERED.

ENTERED this 17th day of March 2003 at Denver, Colorado.

/s/ Patrick G. Geraghty
PATRICK G. GERAGHTY
ADMINISTRATIVE LAW JUDGE

[LOGO]
U.S. Department
of Transportation

800 Independence Avenue
Washington, D.C. 20591

---

[8]Respondent's denial that he received "substantive notice" is deemed insufficient to rebut the TSA's January 24, 2003 letter: Initial Notification of Threat Assessment, receipt of which is not denied. Respondent's denial that he poses a security threat does not dispute the allegation contained in Paragraph 5 of the Complaint. Further, Exhibit D, Complainant's Motion, establishes that TSA advised FAA.

[9]The Affirmative Defenses raised in Respondent's Answer are not issues reviewable; however, they are to be considered as raised and preserved for any further appeal purposes.

Federal Aviation
Administration

CERTIFIED MAIL - RETURN RECEIPT REQUESTED AND FACSIMILE

January 29, 2003

Maan Hassan Zarie
c/o Thomas J. Whalen, Esq.
Condon & Forsyth LLP
1016 Sixteenth St. N.W.
Washington, D.C. 20036

Re: Case No. 2003AGC10006

AMENDED EMERGENCY ORDER OF SUSPENSION

Based upon an investigation and by reason of the following circumstances the Administrator of the Federal Aviation Administration (FAA) has determined the following:

1. You are now, and at all times mentioned herein, were the holder of Airline Transport Certificate No. 2293881, with Airplane Multi-engine Land Rating, issued under part 61 of the Federal Aviation Regulations, 14 C.F.R. part 61; an Airplane Single-engine Land Rating is attached to the private pilot privileges of Airline Transport Certificate No. 2293881.

2. On January 21, 2003, the FAA and the Transportation Security Administration (TSA) issued final rules, which were placed on display at the Federal Register on January 22, 2003. The rules became effective on January 24, 2003.

3. The TSA, which published two final rules, has established a process for notifying an individual that he or she has been determined to pose a security threat and to advise the FAA of its determination. One rule prescribes the process that applies to aliens (Attachment A); the other rule applies to citizens of the United States of America (Attachment B).

4. That portion of the FAA rule that pertains to airman pilot certificates, which will be codified at 14 C.F.R. § 61.18 (Attachment C), expressly makes a person ineligible to hold such a certificate if the TSA notifies the FAA in writing that the person poses a security threat.

5. On January 24, 2003, the Assistant Administrator for Intelligence of TSA informed the FAA that upon his personal review of materials available to TSA, he has "determined that you pose a security threat." The Assistant Administrator further informed you of the process available under 49 C.F.R. § 1540.117 to challenge the TSA's Initial Notification.

6. As a result of the TSA Assistant Administrator's Initial Notification of Threat Assessment described above, you are not eligible under Section 61.18 of the Federal Aviation Regulations, 14 C.F.R. § 61.18, to hold an airman certificate, rating, or authorization issued under Part 61.

By reason of the foregoing facts and circumstances, the Administrator has determined that you presently lack the qualifications required of the holder of an airman certificate. The Administrator also has determined that safety in air commerce or air transportation and the public interest require the indefinite suspension of any airman certificate held by you, including your Airline Transport Certificate No. 2293881. Furthermore, the Administrator finds that an

emergency exists and that safety in air commerce or air transportation and the public interest require the immediate effectiveness of this Order.

NOW, THEREFORE, IT IS ORDERED, pursuant to the authority vested in the Administrator by 49 U.S.C. §§ 44709(b)(1)(A) and 46105(c), that:

1. Any airman certificate held by you, including your Airline Transport Certificate No. 2293881, is suspended for an indefinite period of time.

2. Such suspension shall become effective as of the date of this order.

/s/ James W. Whitlow

James W. Whitlow
Deputy Chief Counsel

APPENDIX C

United States Court of Appeals
For the District of Columbia Circuit

No. 03-1085 September Term, 2003

Filed On: August 9, 2004 [841303]

Tarek H. Jifry and Maan H. Zarie,
Petitioners

v.

Federal Aviation Administration,
Respondent

Consolidated with 03-1143, 03-1144, 03-1282

BEFORE: Rogers, Tatel, and Garland, Circuit Judges

ORDER

Upon consideration of petitioners' petition for rehearing filed July 26, 2004, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit

No. 03-1085 September Term, 2003

Filed On: August 9, 2004 [841300]

Tarek H. Jifry and Maan H. Zarie,
Petitioners

v.

Federal Aviation Administration,
Respondent

Consolidated with 03-1143, 03-1144, 03-1282

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, and Roberts, Circuit Judges

ORDER

Upon consideration of petitioners' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

49 U.S.C. § 44709. Amendments, modifications, suspensions, and revocations of certificates

(a) Reinspection and Reexamination.— The Administrator of the Federal Aviation Administration may reinspect at any time a civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or reexamine an airman holding a certificate issued under section 44703 of this title.

(b) Actions of the Administrator.— The Administrator may issue an order amending, modifying, suspending, or revoking—

(1) any part of a certificate issued under this chapter if—

(A) the Administrator decides after conducting a reinspection, reexamination, or other investigation that safety in air commerce or air transportation and the public interest require that action; or

(B) the holder of the certificate has violated an aircraft noise or sonic boom standard or regulation prescribed under section 44715 (a) of this title; and

(2) an airman certificate when the holder of the certificate is convicted of violating section 13(a) of the Fish and Wildlife Act of 1956 (16 U.S.C. 742j–1 (a)).

(c) Advice to Certificate Holders and Opportunity To Answer.— Before acting under subsection (b) of this section, the Administrator shall advise the holder of the certificate of the charges or other reasons on which the Administrator relies for the proposed action. Except in an emergency, the Administrator shall provide the holder an opportunity to answer the charges and be heard why the certificate should

not be amended, modified, suspended, or revoked.

(d) Appeals.—

(1) A person adversely affected by an order of the Administrator under this section may appeal the order to the National Transportation Safety Board. After notice and an opportunity for a hearing, the Board may amend, modify, or reverse the order when the Board finds—

(A) if the order was issued under subsection (b)(1)(A) of this section, that safety in air commerce or air transportation and the public interest do not require affirmation of the order; or

(B) if the order was issued under subsection (b)(1)(B) of this section—

(i) that control or abatement of aircraft noise or sonic boom and the public health and welfare do not require affirmation of the order; or

(ii) the order, as it is related to a violation of aircraft noise or sonic boom standards and regulations, is not consistent with safety in air commerce or air transportation.

(2) The Board may modify a suspension or revocation of a certificate to imposition of a civil penalty.

(3) When conducting a hearing under this subsection, the Board is not bound by findings of fact of the Administrator but is bound by all validly adopted interpretations of laws and regulations the Administrator carries out and of written agency policy guidance available to the public related to sanctions to be imposed under this section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law.

(e) Effectiveness of Orders Pending Appeal.—

(1) In general.— When a person files an appeal with the Board under subsection (d), the order of the Administrator is stayed.

(2) Exception.— Notwithstanding paragraph (1), the order of the Administrator is effective immediately if the Administrator advises the Board that an emergency exists and safety in air commerce or air transportation requires the order to be effective immediately.

(3) Review of emergency order.— A person affected by the immediate effectiveness of the Administrator's order under paragraph (2) may petition for a review by the Board, under procedures promulgated by the Board, of the Administrator's determination that an emergency exists. Any such review shall be requested not later than 48 hours after the order is received by the person. If the Board finds that an emergency does not exist that requires the immediate application of the order in the interest of safety in air commerce or air transportation, the order shall be stayed, notwithstanding paragraph (2). The Board shall dispose of a review request under this paragraph not later than 5 days after the date on which the request is filed.

(4) Final disposition.— The Board shall make a final disposition of an appeal under subsection (d) not later than 60 days after the date on which the appeal is filed.

(f) Judicial Review.— A person substantially affected by an order of the Board under this section, or the Administrator when the Administrator decides that an order of the Board under this section will have a significant adverse impact on carrying out this part, may obtain judicial review of the order under section 46110 of this title. The Administrator shall be

made a party to the judicial review proceedings. Findings of fact of the Board are conclusive if supported by substantial evidence.

*****

§ 61.18 Security disqualification.

(a)*Eligibility standard.* No person is eligible to hold a certificate, rating, or authorization issued under this part when the Transportation Security Administration (TSA) has notified the FAA in writing that the person poses a security threat.

(b) *Effect of the issuance by the TSA of an Initial Notification of Threat Assessment.* (1) The FAA will hold in abeyance pending the outcome of the TSA's final threat assessment review an application for any certificate, rating, or authorization under this part by any person who has been issued an Initial Notification of Threat Assessment by the TSA.

(2) The FAA will suspend any certificate, rating, or authorization issued under this part after the TSA issues to the holder an Initial Notification of Threat Assessment.

(c) *Effect of the issuance by the TSA of a Final Notification of Threat Assessment.* (1) The FAA will deny an application for any certificate, rating, or authorization under this part to any person who has been issued a Final Notification of Threat Assessment.

(2) The FAA will revoke any certificate, rating, or authorization issued under this part after the TSA has issued to the holder a Final Notification of Threat Assessment.

[Doc. FAA–2003–14293, 68 FR 3774, Jan. 24, 2003]

*****

§ 1540.117 Threat assessments regarding aliens holding or applying for FAA certificates, ratings, or authorizations.

(a) Applicability. This section applies when TSA has determined that an individual who is not a citizen of the United States and who holds, or is applying for, an airman certificate, rating, or authorization issued by the FAA Administrator, poses a security threat.

(b) *Definitions.* The following terms apply in this section:

Assistant Administrator means the Assistant Administrator for Intelligence for TSA.

Date of service means—

(1) The date of personal delivery in the case of personal service;

(2) The mailing date shown on the certificate of service;

(3) The date shown on the postmark if there is no certificate of service; or

(4) Another mailing date shown by other evidence if there is no certificate of service or postmark.

Deputy Administrator means the officer next in rank below the Administrator.

FAA Administrator means the Administrator of the Federal Aviation Administration.

Individual means an individual whom TSA determines poses a security threat.

(c) *Security threat.* An individual poses a security threat when the individual is suspected of posing, or is known to pose—

(1) A threat to transportation or national security;

(2) A threat of air piracy or terrorism;

(3) A threat to airline or passenger security; or

(4) A threat to civil aviation security.

(d) *Representation by counsel.* The individual may, if he or she so chooses, be represented by counsel at his or her own expense.

(e) *Initial Notification of Threat Assessment.* (1) *Issuance.* If the Assistant Administrator determines that an individual poses a security threat, the Assistant Administrator serves upon the individual an Initial Notification of Threat Assessment and serves the determination upon the FAA Administrator. The Initial Notification includes—

(i) A statement that the Assistant Administrator personally has reviewed the materials upon which the Initial Notification was based; and

(ii) A statement that the Assistant Administrator has determined that the individual poses a security threat.

(2) *Request for materials.* Not later than 15 calendar days after the date of service of the Initial Notification, the individual may serve a written request for copies of the releasable materials upon which the Initial Notification was based.

(3) *TSA response.* Not later than 30 calendar days, or such longer period as TSA may determine for good cause, after receiving the individual's request for copies of the releasable materials upon which the Initial Notification was based, TSA serves a response. TSA will not include in its response any classified information or other information described in paragraph (g) of this section.

(4) *Reply.* The individual may serve upon TSA a written reply to the Initial Notification of Threat Assessment not later than 15 calendar days after the date of service of the Initial Notification, or the date of service of TSA's response to the individual's request under paragraph (e)(2) if such a request was served. The reply may include any information that the individual believes TSA should consider in reviewing the basis for the Initial Notification.

(5) *TSA final determination.* Not later than 30 calendar days, or such longer period as TSA may determine for good cause, after TSA receives the individual's reply, TSA serves a final determination in accordance with paragraph (f) of this section.

(f) *Final Notification of Threat Assessment.* (1) *In general.* The Deputy Administrator reviews the Initial Notification, the materials upon which the Initial Notification was based, the individual's reply, if any, and any other materials or information available to him.

(2) *Issuance of Final Notification.* If the Deputy Administrator determines that the individual poses a security threat, the Deputy Administrator serves upon the individual a Final Notification of Threat Assessment and serves the determination upon the FAA Administrator. The Final Notification includes a statement that the Deputy Administrator personally has reviewed the Initial

Notification, the individual's reply, if any, and any other materials or information available to him, and has determined that the individual poses a security threat.

(3) *Withdrawal of Initial Notification.* If the Deputy Administrator does not determine that the individual poses a security threat, TSA serves upon the individual a Withdrawal of the Initial Notification and provides a copy of the Withdrawal to the FAA Administrator.

(g) *Nondisclosure of certain information.* In connection with the procedures under this section, TSA does not disclose to the individual classified information, as defined in Executive Order 12968 section 1.1(d), and TSA reserves the right not to disclose any other information or material not warranting disclosure or protected from disclosure under law.

[68 FR 3768, Jan. 24, 2003]

Supreme Court, U.S.
FILED
JAN 10 2005
OFFICE OF THE CLERK

(3)

No. 04-620

In the Supreme Court of the United States

TAREK H. JIFRY AND MAAN H. ZARIE, PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

DOUGLAS N. LETTER
JEFFRICA JENKINS LEE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the federal government lawfully revoked the pilot licenses of non-resident aliens based on the Executive Branch's determination that the aliens pose a threat to the security of the United States.

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In the Supreme Court of the United States

No. 04-620

TAREK H. JIFRY AND MAAN H. ZARIE, PETITIONER

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 370 F.3d 1174. The administrative decisions of the National Transportation Safety Board (Pet. App. A17-A21, A27-A30, A31-A32) and its administrative law judge (Pet. App. A22-A26, A33-A38, A42-A47) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 11, 2004. A petition for rehearing was denied on August 9, 2004 (Pet. App. A51). The petition for a writ of certiorari was filed on November 8, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress has charged the Federal Aviation Administration (FAA) with "promot[ing] [the] safe flight of civil aircraft." 49 U.S.C. 44701(a). To that end, Congress has vested the FAA with broad authority to prescribe regulations and standards governing "practices, methods, and procedures" relating to air transportation that the agency "finds necessary for safety in air commerce and national security." 49 U.S.C. 44701(a)(5). The FAA must carry out its responsibilities "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents in air transportation." 49 U.S.C. 44701(c).

Those safety responsibilities include issuing and revoking pilot licenses under terms that take into account "the duty of an air carrier to provide service with the highest possible degree of safety in the public interest." 49 U.S.C. 44702(b)(1)(A). The FAA may, "at any time," reexamine a pilot who has been issued a license, 49 U.S.C. 44709(a), and may "suspend[] or revok[e]" the license if it concludes, after a "reinspection, reexamination, or other investigation that safety in air commerce or air transportation and the public interest require that action," 49 U.S.C. 44709(b)(1)(A). While Congress established certain procedures and considerations to govern the issuance of licenses to pilots who are citizens, 49 U.S.C. 44703, Congress conferred sweeping discretion on the FAA over the issuance of licenses to aliens, allowing the FAA to "restrict or prohibit issuing" licenses to aliens altogether, or to "make issuing the certificate to an alien dependent on a reciprocal agreement with the government of a foreign country," 49 U.S.C. 44703(e)(1) and (2). The FAA,

however, must ensure that its system for issuing pilot licenses comports with other governmental programs "related to combating acts of terrorism." 49 U.S.C. 44703(g)(1) (Supp. I 2001).

b. In the wake of terrorists' use of civilian airliners to attack the United States on September 11, 2001, Congress created the Transportation Security Administration (TSA) and transferred much of the responsibility for civil aviation security from the FAA to the TSA, which is now a component of the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (to be codified at 6 U.S.C. 203(2)). The TSA is "responsible for security in all modes of transportation," including civil aviation. 49 U.S.C. 114(d) (Supp. I 2001). Congress invested the TSA with broad authority to

> (1) receive, assess, and distribute intelligence information related to transportation security; (2) assess threats to transportation; (3) develop poli cies, strategies, and plans for dealing with threats to transportation security; (4) make other plans related to transportation security, including coordinating countermeasures with appropriate departments, agencies, and instrumentalities of the United States Government; * * * (11) oversee the implementation, and ensure the adequacy, of security measures at airports and other transportation facilities; [and] (12) require background checks for * * * individuals with access to secure areas of airports.

49 U.S.C. 114(f) (Supp. I 2001). As relevant here, Congress directed the TSA to "establish procedures for notifying the Administrator of the [FAA] * * * of the

identity of individuals known to pose, or suspected of posing, a risk of * * * terrorism." 49 U.S.C. 114(h)(2) (Supp. I 2001).

c. On January 24, 2003, the FAA, in coordination with the TSA, issued a regulation establishing that an individual is not qualified for a pilot license if the TSA concludes that the person "poses a security threat." 14 C.F.R. 61.18(a). The TSA simultaneously issued a regulation establishing procedures for threat assessments of non-resident aliens who hold or apply for FAA certificates. 49 C.F.R. 1540.117; see 68 Fed. Reg. 3762 (Jan. 24, 2003). Under that regulation, if the TSA Assistant Administrator determines that an alien holding an FAA certificate poses a security threat, he will serve an Initial Notification of Threat Assessment upon the individual and the FAA. 49 C.F.R. 1540.117(e)(1). An individual will be found to pose a "security threat" if he "is suspected of posing, or is known to pose (1) A threat to transportation or national security; (2) A threat of air piracy or terrorism; (3) A threat to airline or passenger security; or (4) A threat to civil aviation security." 49 C.F.R. 1540.117(c).

Upon receiving the Initial Notification, the FAA will suspend any pilot license or other airman certificate held by the alien, pending the outcome of the TSA's final threat assessment. 14 C.F.R. 61.18(b)(1). The alien may, within 15 days of receiving the Initial Notification, serve a written request for copies of the materials upon which it was based. 49 C.F.R. 1540.117(e)(1) and (2). Within 30 days, TSA must provide any pertinent materials, but it may not disclose any material that is classified or protected from disclosure under law. 49 C.F.R. 1540.117(e)(3). Given the nature of security-threat determinations regarding aliens, the TSA has

advised that, in most cases, the threat assessments will be based largely or exclusively on non-disclosable classified national security information, unclassified information designated as sensitive security information, or other information protected from disclosure by law. 68 Fed. Reg. at 3764.

Within 15 days of the TSA's response (or, if the individual did not request a response, within 15 days of receiving the Initial Notice), the alien may serve a written reply upon TSA, challenging its initial threat assessment determination and including any information that the alien believes the TSA should consider. 49 C.F.R. 1540.117(e)(4). The entire record is then reviewed de novo by the TSA Deputy Administrator. 49 C.F.R. 1540.117(f)(1). If the TSA Deputy Administrator determines that the alien pilot poses a security threat, he will issue a Final Notification of Threat Assessment, *ibid.*, and the FAA will revoke any pilot license or other airman certificate possessed by that individual, 14 C.F.R. 61.18(c)(2).

As relevant here, the alien could appeal the revocation to the National Transportation Safety Board (NTSB). 49 U.S.C. 44709(d); see also note 2, *infra*. The NTSB, however, may not review the merits of the threat assessment. Its review is limited to examining the revocation process to ensure procedural regularity. See *Administrator* v. *Lloyd*, 1 N.T.S.B. 1826, 1828 (1972). The alien may then obtain review in a federal court of appeals. 49 U.S.C. 44709(f); 49 U.S.C. 46110 (2000 & Supp. I 2001). In those proceedings, the government has been making any classified or otherwise non-

releasable information on which the revocation decision was made available to the courts for *in camera* review.[1]

d. While petitioners' case was pending before the court of appeals, Congress enacted the Vision 100—Century of Aviation Reauthorization Act, Pub. L. No. 108-176, § 601, 117 Stat. 2561 (to be codified at 49 U.S.C. 46111) (Vision 100 law), which now governs security-based pilot license revocations. That statute directs the FAA to suspend or revoke immediately any airman's certificate if the FAA "is notified by the Under Secretary for Border and Transportation Security of the Department of Homeland Security that the holder of the certificate poses, or is suspected of posing, a risk of air piracy or terrorism or a threat to airline or passenger safety," and if the Under Secretary requests that the order be given immediate effect. Pub. L. No. 108-176, § 601, 117 Stat. 2561 (to be codified at 49 U.S.C. 46111(a)). Congress statutorily established appellate procedures for the certificate-revocation process for citizens. Pub. L. No. 108-176, § 601, 117 Stat. 2561-2562 (to be codified at 49 U.S.C. 46111(b)-(g)).[2] Congress did

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[1] In promulgating their regulations in January 2003, both the FAA and the TSA determined that the regulations—which "codifie[d] the fundamental and inherently obvious principle that a person who TSA determines poses a security threat should not hold an FAA-issued airman certificate," 68 Fed. Reg. at 3759—should be immediately issued to minimize potential security vulnerabilities. The court of appeals upheld the agencies' conclusion that good cause existed for "not offering advance public participation," in light of the agencies' "legitimate concern over the threat of further terrorist acts involving aircraft in the aftermath of September 11, 2001." Pet. App. A8. Petitioners have not sought this Court's review of that aspect of the court of appeals' decision.

[2] The amendment also eliminated NTSB review of revocation decisions. Persons whose licenses have been revoked now may appeal

not impose any such requirements for the revocation of licenses held by aliens, however. See H.R. Conf. Rep. No. 334, 108th Cong., 1st Sess. 152 (2003) (the appeal rights for non-resident aliens are limited to those "procedures that [TSA] has already provided for them").

2. Petitioners are non-resident alien pilots from Saudi Arabia who are employed by Saudi Arabian Airlines and who previously held FAA-issued pilot certificates. Pet. App. A3. They used their certificates to fly foreign aircraft primarily between Saudi Arabia and Europe, as well as points in Asia and Africa. *Ibid.*; C.A. App. A191, A208. Petitioner Jifry had not piloted an aircraft to the United States since 1995, and petitioner Zarie had not piloted an aircraft to the United States since 2000. Pet. App. A3; C.A. App. A191, A208.

On January 24, 2003, the TSA Assistant Administrator for Intelligence issued an Initial Notification of Threat Assessment to each petitioner, stating that, "based upon materials available to [TSA] which I have personally reviewed, I have determined that you pose a security threat." C.A. App. A95; see Pet. App. A4. That same day, the FAA issued Emergency Orders of Suspension of petitioners' pilot licenses. Pet. App. A4.; C.A. App. A97-A102. Petitioners pursued their administrative appeal rights, 49 C.F.R. 1540.117(e), and requested that TSA provide copies of the materials upon which the Initial Notifications of Threat Assessment were based. Pet. App. A4. TSA provided petitioners with the material underlying its security threat assessment that could be released, but the majority of the material upon which TSA relied was withheld

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the FAA order directly to the court of appeals. Pub. L. No. 108-176, § 601(a), 117 Stat. 2562 (to be codified at 49 U.S.C. 46110).

because it is classified. *Ibid.* The TSA Deputy Administrator subsequently issued a final determination that petitioners pose a security threat, and the FAA revoked petitioners' pilot licenses. *Id.* at A5.

Petitioners appealed to the NTSB, which affirmed the revocation. See Pet. App. A17-A21; see also *id.* at A22-A25. The NTSB ruled that it lacked "jurisdiction to review the validity of TSA security threat assessments," *id.* at A18, and it accordingly confined its review to the question whether the FAA's revocation decision followed the appropriate procedure, *id.* at A18-A19; see *id.* at A28-A29.

3. The court of appeals affirmed, denying the alien pilots' petitions for review. Pet. App. A1-A16. The court first rejected petitioners' challenge to the validity of the regulations establishing the threat-assessment and license-revocation procedures, holding that "[i]t is self-evident that the regulations are related to the TSA's and FAA's goals of improving the safety of air travel." *Id.* at A8.

The court also held that substantial evidence supported the threat-assessment and attendant license-revocation decisions. In addition to submitting the materials underlying the threat assessment decision to the court of appeals *in camera*, the government submitted an unsealed affidavit from the TSA Deputy Administrator. See *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973) (where, on a petition for review, the public administrative record contains an insufficient explanation of agency action, the agency may submit, "either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary"). The court of appeals held that the record reviewed *in camera* and the public affidavit

"provide[] an adequate basis for the TSA's determination that [petitioners] each posed a 'security threat.'" Pet. App. A10 (quoting 49 C.F.R. 117(c)). The court explained that the TSA's judgment was properly based on "classified intelligence reports, combined with reports from the intelligence community that aircraft would continue to be used as weapons of terrorism, and consideration of the ease with which an individual may obtain access to aircraft in the United States once he or she has a pilot license." *Id.* at A10-A11 (internal quotation marks omitted).

Finally, the court of appeals rejected petitioners' due process challenge to the revocations. The court held that, even assuming that non-resident alien pilots enjoyed a property interest protected by the Fifth Amendment, petitioners "received all the process that they are due." Pet. App. A13. The court held, in particular, that the opportunity to file a written reply to the TSA's initial determination, to obtain independent *de novo* review of the administrative record by the Deputy Administrator of the FAA, and to have subsequent judicial review of the record provided sufficient protection for petitioners' interest (if any) in possessing FAA licenses to fly United States-registered aircraft, especially when weighed against the government's significant "security interests in preventing pilots from using civil aircraft as instruments of terror." *Id.* at A14.

ARGUMENT

1. Petitioners seek (Pet. 11-19) this Court's review of the court of appeals' holding that the threat-assessment and license-revocation proceedings comport

with due process. That claim does not merit further review for three reasons.

First, given how recently the regulations and administrative procedures were adopted, as well as Congress's recent enactment of legislation that generally revises the threat-assessment and license-revocation procedures, see Vision 100—Century of Aviation Reauthorization Act, Pub. L. No. 108-176, § 601, 117 Stat. 2561 (to be codified at 49 U.S.C. 46111), review would be premature. The decision below represents the first court of appeals' decision to address the constitutionality of the regulatory proceedings, either before or after passage of the Vision 100 law in 2003. No other court of appeals has addressed the question. Nor are any other cases involving alien pilots pending in any federal court of appeals.[3]

Second, and relatedly, there is no conflict in the circuits on the question of the regulatory scheme's constitutionality. Petitioners' argument (Pet. 14-17) that the court of appeals' decision conflicts with the Ninth Circuit's decision in *American-Arab Anti-Discrimination Comm.* v. *Reno*, 70 F.3d 1045 (1995), is without merit. That case concerned the constitutionality of procedures used to deny legalization to and thus to deport aliens who were physically present in the United States. The case did not involve the constitutionality of regulatory procedures employed solely to deny aliens in foreign countries a limited occupational privilege. The constitutional "distinction between an alien who has

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[3] A case challenging the separate regulations governing the revocation of pilot licenses held by citizens and resident aliens was dismissed as moot by the D.C. Circuit following Congress's enactment of the Vision 100 legislation. See *Coalition of Airline Pilots Ass'ns* v. *FAA*, 370 F.3d 1184 (2004).

effected an entry into the United States and one who has never entered runs throughout [the] law." *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001).[4]

Petitioners' contention (Pet. 18-19) that the D.C. Circuit's opinion in this case conflicts with that circuit's rulings in earlier cases does not merit this Court's review. Any such intra-circuit conflict could be addressed by the D.C. Circuit en banc. Indeed, petitioners sought rehearing en banc in this case, but the court of appeals denied their petition. Pet. App. A52. The court's decision in this case, moreover, fully comports with prior circuit precedent.[5]

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[4] See also *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958) (rights and privileges accorded resident aliens are denied to those who have not effected an entry); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law"; an alien who has not entered "stands on a different footing"); cf. *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 543 (1950) ("Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.").

[5] See *National Council of Resistance of Iran* v. *Department of State*, 251 F.3d 192, 208 (D.C. Cir. 2001) (in designating foreign terrorist organizations under the Antiterrorism and Effective Death Penalty Act of 1996, 8 U.S.C. 1189, the State Department must "afford to the entities under consideration notice [of] the designation," but, "where earlier notification would impinge upon the security and other foreign policy goals of the United States," the agency may provide "this notice after the designation"); see also *Holy Land Found. for Relief & Dev.* v. *Ashcroft*, 333 F.3d 156, 163 (D.C. Cir. 2003), cert. denied, 540 U.S. 1218 (2004) (the notice of designation as a foreign terrorist organization need not include classified information); *People's Mojahedin Org. of Iran* v. *Department of State*, 327 F.3d 1238, 1242

Third, the decision of the court of appeals is correct. While that court assumed, for purposes of its decision, that petitioners enjoyed the protections of the Due Process Clause (see Pet. App. A13), petitioners do not, in fact, assert any property interest that is protected by the Fifth Amendment. Non-resident aliens have no legally protected interest in obtaining a pilot license from the FAA. Indeed, non-resident aliens have no due process right to be in the United States at all, let alone to obtain a highly regulated conditional privilege or benefit from the government. "The Bill of Rights is a futile authority for the alien" who has never been admitted "to these shores." *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 n.5 (1953) (quoting *Bridges* v. *Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)).[6]

(D.C. Cir. 2003) ("[D]ue process require[s] the disclosure [to petitioners] of *only* the unclassified portions of the administrative record * * *. [T]he Executive Branch has control and responsibility over access to classified information and has a 'compelling interest' in withholding national security information from unauthorized persons.") (quoting *Department of Navy* v. *Egan*, 484 U.S. 518, 527 (1988)).

[6] See also *Zadvydas*, 533 U.S. at 693 ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."); *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."); *Johnson* v. *Eisentrager*, 339 U.S. 763, 783 (1950) (rejecting proposition that "the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses"); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens."); *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 293 (1904) (aliens outside the United States "cannot assert

Accordingly, for non-resident aliens like petitioners, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien [who has not effected an] entry is concerned." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (quoting *Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950)). "Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952). That is because "any policy toward aliens"—including assessing the threat they may pose to national security and allocating professional licenses to them—"is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Demore* v. *Kim*, 538 U.S. 510, 522 (2003) (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 81 n.17 (1976), and *Harisiades*, 342 U.S. at 588-589). Deference to the judgments and processes implemented by the Political Branches in this context is vital "for maintaining normal international relations and defending the country against foreign encroachments and dangers." *Kleindienst* v. *Mandel*, 408 U.S. 753, 765 (1972) (citation omitted).

Although the legal effect of the FAA's decision precludes petitioners only from operating United States-registered civil aircraft, petitioners object that, as a practical matter, the revocation of their licenses precludes them from piloting airplanes in their home or foreign countries. Pet. 3 n.1, 8, 11. That may be, but it

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the rights in general obtaining in a land to which they do not belong as citizens or otherwise").

does not change the constitutional analysis. If foreign governments choose to attach consequences to the regulatory actions of the United States Government, that is a matter for petitioners to take up with those foreign governments. The Fifth Amendment does not protect the rights of aliens on foreign soil to obtain privileges from foreign governments.

In any event, as the court of appeals correctly held, petitioners received all the process that they were due "under the circumstances of this sensitive matter of classified intelligence in the effort to combat foreign terrorism." Pet. App. A15 (citation omitted). Petitioners were afforded notice, an opportunity to be heard, and independent judicial review of the FAA's revocation decision.[7] Those procedures amply vindicate any constitutional interest that petitioners, as non-resident aliens, may have—an interest that "pales in significance" when compared to the United States' "obvious and unarguable" interest in ensuring the Nation's security. *Id.* at A14 (citations omitted).

2. Petitioners' contention (Pet. 20-25) that the court of appeals' decision "[e]viscerates" the protections afforded by the Administrative Procedure Act, 5 U.S.C. 555, 702, 706, and the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731, likewise does not merit this Court's review. Petitioners cite no case holding that either of those statutes afforded greater protection to non-resident alien pilots. In any event, Congress is free,

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[7] Petitioners' argument (Pet. 18-19) that classified information may not be used in proceedings affecting the interests of non-resident aliens is squarely foreclosed by *Mezei*. See 345 U.S. at 214-215 (exclusion and resultant detention of non-resident alien may be undertaken, pursuant to agency regulations, "without a hearing," and the Attorney General need not "disclose the evidence upon which that determination rests").

through the enactment of subsequent and particularized legislation, to restrict the operation of general laws, especially when necessary to respond to emergent threats to national security. Congress's recent passage of the Vision 100 law, which now regulates the revocation of pilots' licenses, effectively ratified the very regulatory processes that petitioners challenge. As the court of appeals explained, that new law "now provides an express statutory authorization for the automatic revocation that was previously predicated on the regulations alone," and the statute "compel[s] the FAA to honor the TSA's notification and [to] take immediate action against the pilots' certificates." Pet. App. A9. In addition, the amended law "makes no provision for NTSB review even for citizens, and the Conference Report states that non-resident aliens 'have the right to the appeal procedures that [TSA] has already provided for them.'" *Ibid.* (quoting H.R. Conf. Rep. No. 334, *supra*, at 152).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 2004

TAREK H. JIFRY;
MAAN H. ZARIE

PETITIONERS,

v.

FEDERAL AVIATION ADMINISTRATION;
TRANSPORTATION SECURITY ADMINISTRATION; AND
NATIONAL TRANSPORTATION SAFETY BOARD

RESPONDENTS.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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ARGUMENT

In its Opposition, the Government embraces the holding of the Court below that non-citizens whose rights are adversely affected by Government action are not entitled to the core due process rights of notice and an opportunity to challenge the basis of the Government action before a neutral, independent decisionmaker.

These core due process rights were denied by the Government and the Court below. After almost two decades of service as pilots with untainted records, their airman certificates were revoked by the Federal Aviation Administration (FAA) because, for reasons unknown, the pilots were allegedly risks to U.S. national security.

The Government says that these pilots received all the "process" that they were "due" because the secret evidence claimed to support the charge was reviewed by a high official of the Transportation Security Administration and *in camera* by the Court below.

This Court established a balancing test set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine the level of due process which must be afforded. Petitioners believe that the Court in *Mathews* and its progeny was in no way dismissive of constitutional and administrative due process concerns. In that case, the Court was grappling with the difficult issue as to whether a full dress hearing with witnesses and live testimony was necessary as a core due process right which must be provided in every kind of administrative proceeding in this country. The Court, in some detail, set forth that the petitioner in that case was given the notice of the basis of the denial of petitioner's claim and the right to challenge the basis with evidence. The only question was whether a paper hearing on the record before an independent adjudicator sufficiently comported with due process. Balancing a number of factors, the Court held that a full dress hearing was not necessary and the petitioner in that case received the process that was due.

This Court has never held, and it is inconceivable that the Court would ever hold that a litigant, a citizen or not, receives "process that is due" where, as here, a pilot's license is revoked because he was determined to be a threat to national security by the Agency with no notice of the nature or basis for the claim and where the determination is based entirely on secret information.

I. This case raises an important question of due process.

This case raises the important question as to whether the U.S. Government may revoke a pilot's FAA-issued airman's certificate based solely upon classified evidence without notice and an opportunity to challenge the basis of the revocation. The Government says yes, if the pilot is a non-citizen, arguing that a non-citizen in a U.S. proceeding has no due process rights (notwithstanding the plain language of 49 U.S.C. § 44709 and its application to citizens and non-citizens alike).

Due process rights are meant to protect a person from being deprived of property or liberty mistakenly or unjustly in a U.S. proceeding, or over which the U.S. has jurisdiction. The Court has repeatedly described the essence of due process rights.

> 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and a meaningful manner.'

Hamdi v. Rumsfeld, 159 L. Ed. 2d 578, 601-602 (2004) (*quoting Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (other citations omitted)). The pilots in this case were denied these rights.

In its Opposition, the Government contends that because this is the first time that any pilots have been stripped of their certificates based upon a TSA threat assessment, this writ is premature. It is certainly not premature as to these pilots, whose careers and reputations have been destroyed by the FAA revocation.

On the contrary, the decision below establishes a precedent so sweeping in administrative law and administrative due process that administrative agencies will be empowered to adjudicate rights without notice and an opportunity to challenge the charge in a secret administrative proceeding on a secret administrative record, reminiscent of a Star Chamber.

The Government claims in its opposition that the petitioners as non-citizens have no property interest in their airmen certificates and therefore no due process rights to challenge the revocation. (Opposition at 12). This assertion is simply wrong.

In addition to the fact that the governing statute, 49 U.S.C. § 44709, expressly provides core due process rights to all pilots holding FAA airman certificates, citizen and non-citizen alike, courts have routinely held that individuals have a property interest in permits and licenses such as the certificates at issue in this case. *Illinois v. Batchelder*, 463 U.S. 1112, 1116 (1983); *Mackey v. Montryn*, 443 U.S. 55, 64 (1979); *Bell v. Burson*, 402 U.S. 535, 539 (1971).

The issue in this case centers on the FAA's authority to revoke airmen certificates pursuant to 49 U.S.C. § 44709(b). In its opposition, the Government mistakenly relies on those FAA regulations regarding the issuance of certificates. Opposition at 2-3. Repeatedly, the Government refers to pilots "obtaining" a certificate. ("Non-resident aliens have no legally protected interest in **obtaining** a pilot license from the FAA." Opposition at 12; "The fifth amendment does not protect the rights of aliens on foreign soil to **obtain** privileges..." Opposition at 14.) The standard for "obtaining" a certificate is not at issue in this case. The standard for issuing certificates is set out in 49 U.S.C. § 44703, whereas the statute for revoking certificates, in question in this case, is set out in 49 U.S.C. § 44709 augmented by the Administrative Procedure Act, 5 U.S.C. § § 553-559 (2000)(APA).

While the FAA, in the Government's view, may have what

the Government refers to as "sweeping discretion" in issuing a certificate, the statute does not provide similar discretion in revoking certificates. Once the FAA in its discretion has issued an airman certificate, due process rights attach to that interest and the FAA must afford a pilot due process rights before revoking his certificate under 49 U.S.C. § 44709.

The Government also is entirely dismissive of the consequences of the FAA action to the pilots and to an international agreement with Saudi Arabia. The Government acknowledges that the revocations in question will preclude the pilots from flying not only to the United States but within their home-country, Saudi Arabia, as well as between Saudi Arabia and other countries. Opposition at 13. The Government, however, states that "If foreign Governments choose to attach consequences to the regulatory actions of the United States Government, that is a matter for the petitioners to take up with the foreign governments." Opposition at 14.

This cavalier statement is short on facts. The Saudi pilot petitioners did not choose to obtain FAA certificates. No, because of the Government's international agreement with Saudi Arabia the only way that Saudi pilots can be certified is by the FAA. They obtained the certificates as a result of a Memorandum of Understanding that has existed for over twenty years between the Governments of the United States and Saudi Arabia.

In 1982, the Governments of the United States and Saudi Arabia entered into an agreement whereby the United States through the FAA agreed to undertake the issuance and inspection of airman certificates issued to Saudi pilots to operate Saudi Arabian registered aircraft. Since 1984, under an exemption specifically granted by the FAA to Saudi Arabian Airlines as a result of the Memorandum of Understanding between the two countries, the FAA certifies all Saudi pilots. This exemption has been actively renewed by the FAA every two years since 1984 and the FAA maintains an active presence in Saudi Arabia carrying out its duties under the

international agreement and the exemption.

The Government of Saudi Arabia by international agreement accepted the FAA expertise and experience in certifying and inspecting its pilots and agreed to the FAA process for suspending, amending and revoking certificates and the due process rights attendant to such actions. As the FAA is fully aware, the Saudi Presidency of Civil Aviation (PCA) does not independently issue airman certificates. For the U.S. Government, in the face of this international agreement in force for many years, to now state that this is a matter that the pilots should take up with the foreign government, ignores or simply misunderstands the contractual commitment of the United States in its agreement with Saudi Arabia. That commitment of the U.S. is to treat Saudi pilots like U.S. citizen pilots whose licenses may be revoked pursuant to 49 U.S.C. § 44709.

The Saudi pilots clearly possess property rights in the airman certificates and the FAA can not constitutionally strip the pilots of that property without affording them due process rights.

II. The decision below does create a split in the circuits.

Contrary to the Government's assertions, the decision in this case does conflict with the Ninth Circuit decision in *American-Arab Anti-Discrimination Comm. v. Reno* (*AAADC I*), 70 F.3d 1045 (9th Cir. 1995). The conflict is direct and sharp. The Ninth Circuit in *AAADC I*, applying the *Mathews* factors held that a court in its adjudications cannot rely solely on secret, classified evidence. In this case, the Court below did just that and upheld the revocation of the pilots' licenses solely on secret evidence on a secret administrative record, unprecedented in this country, as well as in the D.C. Circuit. See *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986) (Ruth Bader Ginsburg, J.) *aff'd* 484 U.S. 1 (1987) (*per curiam*). In fact, in none of the D.C. Circuit decisions cited in footnote 5 of the Government's Brief or in pages 18-19 of the Petitioner's Petition has the D.C. Circuit ever previously upheld an agency

finding or adjudication solely on secret classified evidence.[1]

The Government argues that there is no split because AADC I dealt with aliens who were physically present in the United States while in the case at hand the petitioners are non-resident aliens who are not physically present within the United States. The holding of the Ninth Circuit was not based upon citizenship; it was based upon administrative due process and adjudication of issues properly before the agency. The Government states that the pilots have a mere "limited occupational privilege." The Government, similarly ignoring 49 U.S.C. § 44709, and the administrative due process provided in the statute and in the APA when a license is revoked, cites no support for this proposition and has mischaracterized the rights of the pilots. (See discussion of *Pastrana supra p 3.*)

In *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192 (D.C. Cir. 2001), the D.C. Circuit stated that an alien, who "acquires or holds property in this country may invoke the protections of the Constitution when the property is placed in jeopardy by government intervention." *Id.* at 204 *citing Russian Volunteer Fleet v. United States*, 282 U.S. 481, 491-492 (1931).

In *Sardino v. The Fed. Reserve Bank of New York*, 361 F.2d 106, 111 (2d Cir. 1966) *cert. denied* 385 U.S. 898 (1966), Judge Friendly citing *Russian Volunteer Fleet* wrote:

> The Government's second answer that "The Constitution of the United States confers no rights on non-resident aliens" is so patently erroneous in a case involving property in the United States that we are surprised it was made. Throughout our history the guarantees of the Constitution have been considered applicable to all actions of the Government within our borders -- and even to some

[1] While an intra circuit conflict exists, the conflict which needs to be resolved by the Court is the conflict between the Ninth Circuit and the D.C. Circuit in the case decided below.

without. Cf. *Reid v. Covert*, 354 U.S. 1, (1957). In *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 489 (1931), the Court squarely held that an alien friend is entitled to the protection of the Fifth Amendment's prohibition of taking without just compensation -- even when his government was no longer recognized by this country. And the Court has declared unequivocally, with respect to non-resident aliens owning property within the United States, that they "as well as citizens are entitled to the protection of the Fifth Amendment."

The cases cited by the government do not involve property interests like FAA-issued licenses in the United States held by foreign citizens, but rather involve deportation hearings and the removal of aliens from the United States. In those cases, questions of due process often hinge on where the alien is located, but in the case at hand, the issue is the property right, not immigration status, and the due process rights accorded to any litigant by statute or the Constitution in a U.S. Court or U.S. administrative proceeding. Accordingly, the government's statement that "non-resident aliens have no due process right to be in the United States at all" is irrelevant. The pilots do not seek admission to the United States, but rather to be provided due process before their FAA certificates are revoked.

The Government contends that non-resident aliens do not have due process rights (Opposition at 12), a somewhat shocking declaration as applied to persons properly before a U.S. court or U.S. administrative agency involving a property or liberty interest. As discussed above, except perhaps in the immigration context, no decision of this Court or any circuit has ever so held.

The Government, in footnote 6, relies on a number of decisions of the Court relating to aliens abroad who claimed due process rights and constitutional protections, including *Johnson v. Eisentrager*, 339 U.S. 763 (1950). The holding in *Eisentrager*, which the Government relies upon, was greatly

limited by last year's decision of the Court in *Rasul v. Bush*, 124 S. Ct. 2684 (2004). *Rasul*, in petitioner's view, stands for the proposition that where the United States authority is in control, anyone, alien and citizen alike, is entitled to challenge the basis of his detention as an enemy combatant and whether he be a citizen or an alien, he has the absolute due process right to know the basis of the Government's charge (why, for example, he is deemed an enemy combatant) and the right to challenge it before an impartial adjudicator. Compelled by our Constitution, this is the way disputes are resolved in the United States, whether an alien or citizen's rights are at issue. The idea that an alien has no rights or fewer rights than a citizen is contrary to our Constitution and its promise of equal justice under the law.

Very recently, in a landmark ruling by the House of Lords, in *A and Others v. Secretary of State for the Home Department*, [2004] UKHL 56 (Dec. 16, 2004) *available at* http://www.parliament.the-stationary-office.co.uk/pa/ld200405/ldjudgmt/jd041216/a&others.pdf, a case was decided which involved a number of aliens detained as terrorists who wished to challenge their detention. Under United Kingdom statutes and the European Convention on Human Rights, the House of Lords, in several lengthy concurring opinions, held that in terms of rights secured under the Convention, citizenship is not relevant and that aliens and citizens have the same due process rights.

The recent House of Lords decision is aligned with the long precedent of this Court which has never discriminated against aliens and denied due process rights in proceedings in the United States.

The Government's view is wrong and this issue is one this Court, once again, should affirm.

III. The decision below eviscerates the procedural protections afforded by Congress in the APA and the Federal Aviation Act of 1958.

The pilots, in their petition, contend as they did in the Court below, that the Executive cannot "eviscerate" or displace an

Act of Congress. The Government's answer is essentially that the pilots "cite no case holding that either of those statutes afforded greater protection to non resident alien pilots." Opposition at 14. The pilots have sought "not greater protection," but simply the basic due process rights which Congress enshrined in the statute applicable to everyone equally, citizen and non-citizen alike.

When enacting the Federal Aviation Act of 1958, Congress specifically stated that an aggrieved certificate holder may appeal to the FAA, "where he will be given a full hearing complying in all respects with the requirements of the Administrative Procedure Act." H.R. REP. No. 85-2360 (1958). In accordance with the APA, the aggrieved party is entitled to due process. *See* 5 U.S.C. § § 553-559. No distinction is made based upon citizenship.

The Government contends that when Congress passed Vision 100 – Century of Aviation Reauthorization Act, Pub. L. No. 108-176, § 601, 117 Stat. 2561 codified as 49 U.S.C. § 46111, it ratified the existing FAA/TSA regulatory scheme for revoking certificates of non-resident aliens. This is not the case. First of all, the Vision 100 Act was passed long after the revocations involved in this case and is not the statute in question in this case. Secondly, even to the extent it could shed some light on congressional intent, 49 U.S.C. § 46111 is entirely silent as to the treatment of non-citizens. The Government cites a single line from a legislative history of the Vision 100 Act for the proposition that non-resident aliens have only the due process the TSA has given them in the regulations. The Government has made a huge leap of logic that the silence of the Act strips the petitioners of all APA protections and that indeed presumably the TSA is not bound by the APA. Petitioners contend that the TSA is bound by the APA and that nothing in the new Vision 100 Act states otherwise.

The Government in its Brief seems to recognize the dubious proposition that the TSA and FAA by regulation could

displace or supercede an act of Congress. It contends that a later law, Vision 100 (which has nothing to do with this case) "ratified the very regulatory process that petitioners challenge." Opposition at 15.

Leaving aside the questionable proposition that Congress can ratify aberrant regulatory action, the Government points not to the language of Vision 100 which is silent on the due process rights of non-citizens, but to a line in the legislative history of the act. The thrust of the Government argument is essentially that Congress (probably at the urging of the TSA because of this case) has given "hearing" rights to citizens but not to non-citizens, and, says the Government, therefore non-citizen pilots do not have due process rights at all (even the core rights of notice and opportunity to challenge the basis of the Government's action).

Whether Congress has done this and can do this, in light of the due process guarantees of the U.S. Constitution and its promise of equal justice for all, is an issue for another day. The issues Petitioners bring to the Court are unaffected by what Vision 100 did or what the Government claims it did.

The reasons Petitioner has given why the Writ should be granted remain valid despite the summary response of the Government.

CONCLUSION

Wherefore, for the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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